

No. 12315

United States
Court of Appeals
For the Ninth Circuit.

P. M. BARGER LUMBER CO., a Corporation,
Doing Business Under the Name and Style of
Barger Millwork Company,

Appellant,

vs.

J. L. WHITEHOUSE and INTERSTATE LUM-
BER SALES, INC.,

Appellees.

Transcript of Record

Appeal from the United States District Court,
for the District of Oregon.

FILED
DEC 9 1949

PAUL P. O'BRIEN,
Clerk

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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In the District Court of the United States
for the District of Oregon
Civil No. 4320

P. M. BARGER LUMBER CO., a corporation doing business under the name and style of BARGER MILLWORK COMPANY,
Plaintiff,

vs.

AUSTIN DODDS and J. L. WHITEHOUSE, co-partners doing business under the assumed name and style of Austin Dodds Company; J. L. WHITEHOUSE, an individual doing business under the assumed name and style of Interstate Lumber Sales, and INTERSTATE LUMBER SALES, INC., an Oregon corporation,
Defendants.

PRE-TRIAL ORDER
Preliminary Statement as to
Nature of Action

Plaintiff brings this action to recover damages for a breach of express warranty of kind and quality of a carload of doors purchased on or about January 10, 1948.

General Resume of Facts Admitted by the Parties Hereto and Which Do Not Require Any Proof
It is admitted:

(1) That plaintiff, P. M. Barger Lumber Co., is a corporation existing under and by virtue of the laws of the State of North Carolina, and doing

business under the name and style of Barger Millwork Company, and as such is a citizen of the State of North Carolina.

(2) That the defendant, J. L. Whitehouse, is a citizen of the State of Oregon, and was doing business as Interstate Lumber Sales; that the defendant, Interstate Lumber Sales, Inc., is a corporation existing under and by virtue of the laws of the state of Oregon, since April 1, 1948.

(3) That at all times herein the plaintiff was engaged in the wholesale warehousing and selling of lumber and millwork, with its principal place of business in the City of Stateville, State of North Carolina.

(4) That the defendant, J. L. Whitehouse, was engaged as an individual in the wholesale lumber business in the State of Oregon, under the name and style of Interstate Lumber Sales; that the defendant, Interstate Lumber Sales, Inc., as a corporation, was engaged in the wholesale lumber business at all times herein mentioned after April 1, 1948.

(5) It is admitted a diversity of citizenship exists between the plaintiff and defendants, and that the matter in controversy exceeds \$3000.00, exclusive of interest and costs.

(6) That this action may be dismissed as to defendant, Austin Dodds.

Contentions of Plaintiff

(1) Plaintiff contends that on or about January 10, 1948, defendant agreed to sell and plaintiff agreed to purchase a carload, or 1500, fir wood doors

of a standard design known as F82, and of grade "A," which design and grade defendant warranted.

(2) That plaintiff paid the defendant, in advance, for said carload of doors, the sum of \$11,709.60, plus bank charges of \$12.60, and plaintiff also paid freight charges in the sum of \$918.90, plaintiff's demand for refund.

(3) That defendant shipped to plaintiff a carload of doors that were not as represented and warranted, and plaintiff within a reasonable time notified the defendants of its refusal to accept said doors and offered to return the same in substantially as good a condition as when received, and requested instructions as to disposition of the doors, and requested the refund of the purchase price, the bank charges and the freight. That the defendant advised the plaintiff to hold doors, attempt to find a market for the doors and promised to refund to the plaintiff.

(4) That plaintiff was obliged to warehouse said doors and pay additional cartage thereon in the reasonable sum of \$500.00, special damages.

(5) That the plaintiff informed the defendant, and the defendant knew, that said doors had been sold by the plaintiff for profit; that the plaintiff suffered a loss of \$1200.00 profit as special damages.

(6) That plaintiff contends that by reason of its said notice to defendant it elected to rescind the sale.

(7) Plaintiff contends that said doors were purchased from defendant through one Ruth Meyer, a lumber broker.

Defendant Whitehouse Contends:

(1) That he did not sell the doors to the plaintiff and that no contractual relationship existed at any time between him and plaintiff.

(2) In the event the Court determines that Ruth Meyer was an agent of the plaintiff and that a direct contractual relationship did exist between plaintiff and Whitehouse of which the plaintiff is entitled to take advantage, the defendant Whitehouse contends:

(a) That the plaintiff waived any right to rescind by failing to notify the defendant Whitehouse of the decision to rescind within a reasonable time after delivery to the plaintiff, and failed to return or offer to return the doors to the defendant Whitehouse in substantially as good condition as they were in at the time the property was transferred to the plaintiff.

(b) That the plaintiff further waived and lost any right to rescission by exercising acts of dominion and ownership over the doors at a time and after the plaintiff knew of the alleged defects in the doors upon which the plaintiff bases its position that there was a breach of warranty; said acts of dominion were the sale of a portion of said doors; the retention of the doors; efforts on its behalf to sell the doors; presenting of a claim for damages in transit against the railroad carrier; demand upon Ruth Meyer for an adjustment in price; offering to settle its claim for adjustment of price on basis of whatever Ruth Meyer and defendant, Whitehouse, could work out, and specifically offering to

settle its claim for an adjustment in price at 40c per door.

(c) That the plaintiff offered to settle its claim for an adjustment on the price of the doors for 40c per door and the defendant Whitehouse accepted said offer and sent a check in the amount of \$615.00, representing slightly in excess of 40c per door.

(d) That the defendant Whitehouse, acting through his agent, the defendant Interstate Lumber Sales, Inc., on or about September 23, 1948, sent a check in the amount of \$615.00 to the plaintiff in full satisfaction of the plaintiff's disputed and unliquidated claim for damages against the defendant Whitehouse, arising out of the sale of said doors; that the plaintiff retained said check and still retains said check and that by accepting and retaining said check on said condition entered into an accord and satisfaction with defendant Whitehouse and accepted said check in full payment and satisfaction of any obligation of the defendant, Whitehouse, under plaintiff's claim.

(e) That by the custom and usage existing in the lumber trade, including trade in fir doors, the plaintiff, as a buyer, was required to make any complaint involving the quality of the doors in question within five days from the receipt of the doors by the plaintiff.

(f) That plaintiff is estopped by his silence and acts of dominion over the doors to deny ownership of the doors and to deny that he accepted defendant Whitehouse's offer of June 25, 1948, to

settle plaintiff's claim on basis of \$615.00 from Whitehouse and \$300.00 from Ruth Meyer.

(g) "That the plaintiff did not offer and was unable to restore and still is unable to restore the defendant to his status quo existing prior to the delivery of the doors to the plaintiff."

(3) That the plaintiff is estopped to claim Ruth Meyer as an agent in the transaction with the defendant Whitehouse for the reason that the plaintiff held out and represented to the said defendant that Ruth Meyer was an independent dealer in wholesale lumber, both before and after the date of the alleged claim by the plaintiff.

(4) By the custom and usage existing in the trade of wholesale lumber dealers and including, but not limited to dealers in fir doors, the transaction between the defendant Whitehouse and Ruth Meyer with respect to the doors in question was a completed sale and no contractual relationship was entered into by said defendant with the plaintiff.

(5) That the relationship existing between Plaintiff and Ruth Meyer, a wholesale lumber dealer, and between Plaintiff and defendant, and defendant and Ruth Meyer were established and determined by the usage and custom of the lumber trade including the buying and selling of fir doors. The Plaintiff contends that the relationship was that Meyer was his agent. If the Plaintiff is correct then the defendant is a subagent and only relationship of Seller-Buyer is between Grant Manufacturing Co., the manufacturer and shipper of the doors.

The Contentions of the Defendant Interstate
Lumber Sales, Inc., Are:

(1) That it never had any contractual relationship with plaintiff except in the capacity of an agent for defendant Whitehouse as contended by said defendant.

(2) That it never assumed any liability which might exist on the part of defendant Whitehouse to the plaintiff.

QUESTIONS OF LAW

(1) Was there a breach of an express warranty by the defendants as vendors to the plaintiff as buyer?

(2) Was there a rescission by plaintiff?

(3) Was Ruth Meyer an agent for plaintiff?

(4) If she was an agent was her agency limited to purchase of the doors, or did agency extend to the handling of settlement of the claim by the plaintiff?

(5) Was there an accord and satisfaction?

(6) Was plaintiff estopped to claim Ruth Meyer was its agent?

(7) Was plaintiff estopped to deny ownership of doors and to deny that it accepted defendant Whitehouse's offer of settlement by plaintiff's conduct after June 25, 1948?

Pre-Trial Exhibits Offered by the
Respective Parties

The following exhibits were offered and received at pre-trial conference and it was stipulated by and between the parties through their respective

counsel, except for the exhibits hereinafter specifically designated, that the same can be admitted in evidence at the time of trial without further identification or authentication and without objection save and except as to their competency, materiality or relevancy, to wit: (The defendants reserve objections on authenticity, identification, competency, and relevancy to the following numbered plaintiff's exhibits: 5; 9; 11; 12; 14; and 15.)

Pre-Trial Exhibits Offered
By the Respective Parties

Offered by Plaintiff:

- Ex. 1. Letter, McLaughlin, dated 3/9/48.
- Ex. 2. Order of acceptance, J. C. Hendricksen.
- Ex. 3. Order, for 582 doors, Ruth Meyer, 1/12/48.
- Ex. 4. Letter, Interstate to Barger, 6/25/48.
- Ex. 5. Letter, McLaughlin to Interstate, 5/17/48.
- Ex. 6. Telegram, Meyer to Barger.
- Ex. 7. Notice of Sight Draft, #6561, 1/19/48.
- Ex. 8. Sight Draft, Bank of California—Barger, No. 6561, 1/19/48.
- Ex. 9. Picture of doors.
- Ex. 10. Brochure, Fir Door Institute.
- Ex. 11. Letter, Meyer to Barger, 1/31/48.
- Ex. 12. Letter, Meyer to Barger, 2/13/48.
- Ex. 13. Copy Letter, Meyer to Hendricksen, 2/24/48 (Def. E.)
- Ex. 14. Letter, Barger to Meyer, 2/14/48.
- Ex. 15. Letter, Meyer to Barger, 3/5/48.

Ex. 16. Meyer to Dodds, 3/5/48 (Def. D.)

Offered by Defendants:

Ex. A Letter, Interstate to Barger, 9/23/48.

Ex. B Letter, Barger to McLaughlin, 9/13/48.

Ex. C Letter, Barger to McLaughlin, 3/13/48.

Ex. D Letter, Meyer to Dodds, 3/15/48 (Pl.
#16)

Ex. E Letter, Meyer to Hendricksen, 2/24/48.

Ex. F Letter, Meyer to Hendricksen, 2/7/48.

Ex. G Letter, Hendricksen to Meyer, 2/5/48 (last
paragraph)

Ex. H Letter, Meyer to Dodds, 1/31/48.

Ex. I Check #312, Interstate to Barger, \$615.00,
6/25/48.

Ex. J Telegram, pencil copy, Barger to Meyer,
2/4/48.

Ex. K Sight draft, Copy, First Nat'l, Eugene
#12225, 1/15/48.

Ex. L Pamphlet, Standards, fir doors, #CS73-45.

Ex. M Letter, Barger to Meyer, 3/2/48.

Ex. N Letter, Meyer to Barger, 3/25/48.

Ex. O Letter, Barger to Meyer, 3/30/48.

Based upon the hearing before this Court, the plaintiff appearing by its attorneys, W. J. Prendergast, Jr. and Leo Levenson, the defendants J. L. Whitehouse and Interstate Lumber Sales, Inc. appearing by their attorneys, Otto F. Vonderheit and Stanley R. Darling, and defendant Austin Dodds appearing by his attorneys, Harris, Bryson, Riddlesbarger and Butler, by Ed Butler.

It Is Ordered that the foregoing constitute the

pre-trial order in the above entitled cause and that the foregoing order supersedes the pleadings and said pre-trial order shall not be amended during the trial except by consent or by order of the Court to prevent manifest injustice.

Dated this 5th day of May, 1949.

/s/ CLAUDE McCOLLOCH,
Judge.

Approved as to form:

/s/ W. J. PRENDERGAST, JR.,
Of Attys. for Plaintiff.

/s/ STANLEY R. DARLING,
Of Attys. for Defendants.

[Endorsed]: Filed May 5, 1949.

[Title of District Court and Cause.]

MEMORANDUM OF DECISION

If Barger has a claim it would be against the estate of Meyer, and under our practice the estate could implead Dodds, et al.

However, I add that I feel plaintiff's course of conduct is inconsistent with rescission. See for example the letter of Barger to Meyer 3/30/48, next to the last paragraph.

Dated May 25, 1949.

/s/ CLAUDE McCOLLOCH,
Judge.

[Endorsed]: Filed May 25, 1949.

[Title of District Court and Cause.]

FINDINGS OF FACT AND
CONCLUSIONS OF LAW

This Cause came on for pre-trial hearing and conference on the 2nd day of May, 1949; the plaintiff appeared by its attorneys, W. J. Prendergast, Jr. and Leo Levenson, Spalding Building, Portland, Oregon; the defendant, Austin Dodds, appeared by his attorneys, Harris, Bryson, Riddlesbarger and Butler, represented by E. A. Butler; the defendants, J. L. Whitehouse and Interstate Lumber Sales, Inc. appeared by their attorneys, Darling & Vonderheit, represented by Otto F. Vonderheit and Stanley R. Darling, 841 Willamette Street, Eugene, Oregon; the parties stipulated in open court that the defendant, Austin Dodds, had no interest in the cause and the Court ordered the dismissal of the defendant, Austin Dodds; the Court then set the cause for trial at 10 a.m., Thursday, May 5, 1949;

This Cause came on for trial before the Court without a jury at 10 a.m., Thursday, May 5, 1949; the parties stated that a pre-trial order had been agreed upon and the pre-trial order was entered and the various exhibits by the respective parties were numbered and admitted subject to any specific objection which either party might desire to make during the course of the trial;

The trial proceeded and the Court heard evidence on behalf of each of the parties and also heard oral arguments by the attorneys for each of the parties; following the arguments the Court indicated that

each of the parties could file points and authorities and thereafter each of the parties through his attorneys filed points and authorities with the Court;

At this time, the Court, having considered all matters at issue in the above cause between the plaintiff and the defendant, J. L. Whitehouse and Interstate Lumber Sales, Inc., an Oregon corporation, said parties being the only parties remaining in the controversy, and being fully advised in the premises, makes the following:

Findings of Fact

I.

That plaintiff, P. M. Barger Lumber Co., is a corporation existing under and by virtue of the laws of the State of North Carolina, and doing business under the name and style of Barger Millwork Company, and as such is a citizen of the State of North Carolina;

II.

That the defendant, J. L. Whitehouse, is a citizen of the State of Oregon; that the defendant, Interstate Lumber Sales, Inc., is a corporation existing under and by virtue of the laws of the State of Oregon, since April 1, 1948;

III.

That at all times herein the plaintiff was engaged in the wholesale warehousing and selling of lumber and millwork, with its principal place of business in the City of Statesville, State of North Carolina;

IV.

That the defendant, J. L. Whitehouse, was en-

gaged as an individual in the wholesale lumber business in the State of Oregon under the name and style of Interstate Lumber Sales during the time of this controversy; that the defendant, Interstate Lumber Sales, Inc., as a corporation, was engaged in the wholesale lumber business at all times during the controversy after April 1, 1948;

V.

That a diversity of citizenship exists between the plaintiff and defendants, and that the matter in controversy exceeds Three Thousand Dollars (\$3,000.00), exclusive of interest and costs;

VI.

That on January 10, 1948, the defendant, J. L. Whitehouse, agreed to sell to Ruth Meyer, a wholesale lumber dealer in Portland, Oregon, a carload (1500 in number) of F82 fir wood doors; that under orders from Ruth Meyer, the defendant, J. L. Whitehouse, was to ship said doors to the plaintiff in Statesville, North Carolina; that this transaction was instituted and completed on the basis of a telephonic order by Ruth Meyer to an employee of the defendant, J. L. Whitehouse, in Portland, Oregon, and the doors were en route from a California manufacturer to the directed destination on January 13, 1948;

VII.

That the doors were purchased from the defendant, J. L. Whitehouse, by Ruth Meyer in her capacity as an independent wholesale lumber dealer and not as an agent of the plaintiff;

Conclusions of Law

I.

That the Court has jurisdiction of this controversy;

II.

That neither the defendant, J. L. Whitehouse, nor the defendant, Interstate Lumber Sales, Inc., an Oregon corporation, sold any doors to the plaintiff; that the only sale of doors which was made was made by the defendant, J. L. Whitehouse, to Ruth Meyer and that said sale did not constitute a sale of the doors in question to the plaintiff either directly or as an undisclosed principal of Ruth Meyer, by either the defendant, J. L. Whitehouse, or the defendant, Interstate Lumber Sales, Inc., that under the customs and usages of the wholesale lumber trade in the Pacific Northwest trade area, including the sale and purchase of fir doors, the purchase of the doors by Ruth Meyer from J. L. Whitehouse was a separate independent transaction complete in itself; that no contractual relationship of Seller and Buyer or other contractual relationship existed at any time between the defendant, J. L. Whitehouse, and the plaintiff with reference to the doors in question; and that no contractual relationship of Seller and Buyer or other contractual relationship existed at any time between the defendant, Interstate Lumber Sales, Inc., an Oregon corporation, and the plaintiff with reference to the doors in question;

III.

That the plaintiff has failed to prove any claim for breach of warranty in the nature of rescission or otherwise against either of the defendants, J. L. Whitehouse, or Interstate Lumber Sales, Inc.; that if the plaintiff has a claim based upon the facts alleged in its complaint and under the provisions of the pre-trial order, then said claim is against Ruth Meyer or against the estate of Ruth Meyer;

IV.

That each of the defendants, J. L. Whitehouse and Interstate Lumber Sales, Inc., are entitled to a judgment in bar against the plaintiff and to their costs and disbursements herein;

Dated at Portland, Oregon, this 16th day of June, 1949.

/s/ CLAUDE McCOLLOCH,
District Judge.

[Endorsed]: Filed June 16, 1949.

In the District Court of the United States
For the District of Oregon
Civil No. 4320

P. M. BARGER LUMBER CO., a corporation doing business under the name and style of BARGER MILLWORK COMPANY,
Plaintiff,

vs.

AUSTIN DODDS and J. L. WHITEHOUSE, co-partners doing business under the assumed

name and style of Austin Dodds Company; J. L. WHITEHOUSE, an individual doing business under the assumed name and style of Interstate Lumber Sales, and INTERSTATE LUMBER SALES, INC., an Oregon corporation,

Defendants.

JUDGMENT

This Cause having come on regularly for trial before the Court sitting without a jury on the 5th day of May, 1949, the plaintiff appearing by its attorneys, W. J. Prendergast and Leo Levenson, Spalding Building, Portland, Oregon, the defendants, J. L. Whitehouse and Interstate Lumber Sales, Inc., appearing by their attorneys, Darling & Vonderheit, 841 Willamette Street, Eugene, Oregon, and this case theretofore having been dismissed as to the defendant, Austin Dodds; and the Court having heard the testimony concerning the issues between the plaintiff and the defendants and being fully advised in the premises, and the Court heretofore having filed herein its Findings of Fact and Conclusions of Law;

Now, Therefore, it is Ordered and Adjudged: (1) that the plaintiff take nothing by its action; (2) that a judgment in bar against the plaintiff and in favor of each of the defendants, J. L. Whitehouse, an individual, and Interstate Lumber Sales, Inc., an Oregon corporation, be and the same hereby is made and entered; and (3) that each of the defendants, J. L. Whitehouse, an individual, and In-

terstate Lumber Sales, Inc., an Oregon corporation take and receive judgment against the plaintiff for costs and disbursements herein.

Dated at Portland, Oregon, this 16th day of June, 1949.

/s/ CLAUDE McCOLLOCH,

District Judge.

[Endorsed]: Filed July 25, 1949.

[Title of District Court and Cause.]

NOTICE OF APPEAL

To J. L. Whitehouse and to Interstate Lumber Sales, Inc., and to Otto F. Vonderheit and Stanley R. Darling, your attorneys:

You, and each of you, are hereby given notice that plaintiff P. M. Barger Lumber Company, a corporation, hereby appeals to the United States Circuit Court of Appeals for the Ninth Circuit from the judgment in favor of the defendants in the above entitled action entered on the 16th day of June, 1949.

Dated at Portland, Oregon, this 11th day of July, 1949.

/s/ W. J. PRENDERGAST, JR.,

/s/ LEO LEVENSON,

Attorneys for Appellants.

[Endorsed]: Filed July 11, 1949.

United States District Court
District of Oregon
No. Civ. 4320

P. M. BARGER LUMBER CO., a corporation
doing business under the name and style of
BARGER MILLWORK COMPANY,
Plaintiff,

vs.

AUSTIN DODDS and J. L. WHITEHOUSE, co-
partners doing business under the assumed
name and style of Austin Dodds Company; J.
L. WHITEHOUSE, an individual doing busi-
ness under the assumed name and style of
Interstate Lumber Sales, and INTERSTATE
LUMBER SALES, INC., an Oregon corpora-
tion,

Defendants.

Before: Honorable Claude McColloch,
Judge.

Appearances:

W. J. PRENDERGAST, JR.,
LEO LEVENSON,
of Attorneys for Plaintiff;

OTTO F. VONDERHEIT,
STANLEY R. DARLING,

Of Attorneys for Defendants J. L. Whitehouse
and Interstate Lumber Sales, Inc.

PROCEEDINGS

The Court: Call your witnesses.

Mr. Prendergast: Mr. Barger. .

CECIL BARGER

was thereupon produced as a witness in behalf of Plaintiff and, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Prendergast:

Q. Will you please state your name to the Court.

A. Cecil Barger.

Q. And where is your residence, Mr. Barger?

A. Statesville, North Carolina.

Q. What is your occupation or business?

A. I am a member of the firm of P. M. Barger Lumber Company and Manager of the Barger Millwork Company, a branch of that corporation.

Q. P. M. Barger Lumber Company is a North Carolina corporation? A. Yes.

Q. And I believe that has been agreed by the parties, the corporate status in the State of North Carolina. [2*] A. Yes.

Q. And what is the Barger Millwork Company; is that a subsidiary?

A. That acts as a subsidiary of the main corporation and deals in millwork items instead of the usual lumber items.

Q. Are you an officer of the P. M. Barger Lumber Company, the corporation? A. Yes.

* Page numbering appearing at top of page of Reporter's original Transcript of Record.

(Testimony of Cecil Barger.)

Q. And I believe you testified you were the Manager of the Barger Millwork, a subsidiary of the P. M. Barger Lumber Company.

A. That is right.

Q. And as such are you in active connection with the millwork division of the company?

A. Yes, altogether.

Q. How long has the P. M. Barger Lumber Company been engaged in business, Mr. Barger?

A. I think since about 1922.

Q. And the name P. M. Barger has reference to whom?

A. My father, who is still active in the firm.

Q. And that lumber company division is still active in North Carolina in the lumber business?

A. Yes.

Q. How long has the Barger Millwork Company been in operation?

A. Since about 1937, approximately eleven years.

Q. And how long have you been active in the management of the Barger Millwork division? [3]

A. Since its organization.

Q. And are you the General Manager and operate that particular branch of the business?

A. Yes.

Q. And where is its main place of business, Mr. Barger?

A. In Statesville.

Q. How large a city is Statesville?

A. Approximately 20,000.

Q. And in what part of North Carolina is it located?

(Testimony of Cecil Barger.)

A. A little to the western part of the state, about centrally north and south.

Q. In reference to Fayetteville, North Carolina, how far is Statesville from Fayetteville?

A. I would say 175, between 150 and 175 miles.

Q. That is served by what railroads?

A. Atlantic Coast Line, among others.

Q. Mr. Barger, would you tell the Court something briefly about the business of the Barger Millwork Company; what do they do?

A. Well, our work is to buy millwork items, principally fir doors which we buy in this part of the country from established door manufacturers in carload quantities, and then we ship them into our warehouse where we generally warehouse them for redistribution on a smaller scale, anywhere from one door to a truck load to retail lumber dealers through North Carolina. [4]

Q. Would you classify the Barger Millwork Company as a wholesale business? A. Yes.

Q. In millwork? A. Yes.

Q. And since the inception of the Barger Millwork Division of the P. M. Barger Lumber Company has it engaged in such type of business?

A. Altogether.

Q. Are you familiar with all of the details and ramifications of the millwork business?

A. Yes.

Q. And with the procedures and practices and usages of that particular trade and wholesaling millwork? A. Yes.

(Testimony of Cecil Barger.)

Q. And that has come about by your experience in managing this company since its inception?

A. Yes.

Q. Now, Mr. Barger, do you know one Ruth Meyer?

A. Yes.

Q. Or, did you know Ruth Meyer?

A. Yes.

Q. How did you happen to know Ruth Meyer; what was your connection, if any, with Ruth Meyer?

A. On various occasions she offered me carloads of doors or [5] other merchandise that we normally handle.

Q. Would you speak up a little bit, please, because I am sure Counsel is not hearing.

A. I say, from time to time she offered us carloads of doors or other commodities that we normally handle, and we bought quite a few of those through her.

Q. Now, do you know what her business was?

A. She was a broker of lumber, primarily.

Q. And do you know where her business was located?

A. At that time in the Davis Building.

Q. That is in Portland, Oregon?

A. Yes.

Q. Have you ever had occasion during the time that Ruth Meyer was in business to visit her office?

A. Yes, I have been there.

Q. And would you describe generally what her business consisted of?

(Testimony of Cecil Barger.)

A. Well, of course, just the office in the building and a desk and a telephone.

Q. Did she have any yard that you know of or any stock of merchandise or inventory?

A. No; no, sir.

Q. From your observations she was purely a broker, doing business as a broker, with an office and telephone; is that correct?

A. Yes, that is correct. [6]

Q. Do you know the Austin Dodds Company?

A. No, I don't. Know them by——

Q. Did you have any business prior to January of 1948 with the Austin Dodds Company?

A. Well, I have never had any direct with them.

Q. But, I mean, did you have business through Ruth Meyer with the Austin Dodds Company?

A. I think she shipped us one car of material, one car of doors that came through them prior to that date.

Q. Prior to this particular car?

A. Just prior.

Q. That is in controversy?

A. The car that we got just prior to that came through them.

Q. Now, would you explain with reference to this particular car and that car that you are now speaking of how you did business; that is, with Ruth Meyer, what occurred?

A. Well, she called me, knowing from past experience the items that I was interested in, she

(Testimony of Cecil Barger.)

called me and stated she had a car of the F-82 doors that we were buying at that time and offered it, gave me the price and the specifications on the car, and I subsequently instructed her to buy it for us.

Mr. Prendergast: May I have this exhibit marked in order that it may be handed to the witness. This is marked on the pre-trial order, your Honor, as Plaintiff's Exhibit No. 10.

(Booklet entitled "Douglas Fir Doors, Standard [7] Designs and Specifications Adopted by the Fir Door Institute," so produced, was thereupon marked for identification Plaintiff's Exhibit No. 10.)

Q. (By Mr. Prendergast): Mr. Barger, you now have a brochure or booklet which has been marked as Plaintiff's Exhibit 10 for Identification. Would you refer to this particular booklet that you now have in your hands with particular reference to specifications, details, and a picture of the door that you have just described as F-82.

A. Yes. On Page 37 they list the specifications for their standard, which is F-82, for a two-panel door.

The Court: What booklet is it?

A. A booklet issued by the Fir Door Institute for purposes of establishing standards in their industry.

Q. (By Mr. Prendergast): Have there been standards set for fir doors?

A. Yes, the fir door manufacturers have set up

(Testimony of Cecil Barger.)

this institute for the purpose of creating standards for both design and grade.

Q. And is this a generally accepted standard in the millwork business?

A. It is for the purchase and handling of fir doors altogether, is the only existing standard.

Q. And you know of no other standards that have been set up or published? [8]

A. Not on fir doors.

Q. Now, so far as you know, as you testified, these standards have been put forth by the manufacturers or certain manufacturers of fir doors and is accepted by the millwork trade generally as the only standard?

A. That is correct.

Q. So that in purchase or sale of fir doors in the wholesale millwork business is reference made to these particular standards by number or name or grade?

A. Yes. For the sake of clarity in ordering doors from a mill we would always specify them by this "F" number, the "F" standing for "Fir" and indicating the "F" number, and we always use their numbers to avoid confusion.

Q. Then F-82 refers to a fir door. Now, what is a Fir-82 door with reference to their standards?

A. It is a two-panel door and the stiles, the vertical members, are a certain width, and the lock rail is located a certain distance from the top and bottom, and the top and bottom rails are certain widths, and it contains panels of a specified type.

(Testimony of Cecil Barger.)

Q. What is the necessity in the millwork trade or business of standards on doors?

A. Well, for the sake of simplicity in dealing with them. Of course, we are set up to handle standard merchandise; that is, merchandise that has standards which have been set up, and the dealers, the retail dealers in millwork items in purchasing from [9] us know that regardless of what mill might ship or manufacture the merchandise they purchase from us it will always match that of any other mill due to this setting up of standards. It simplifies their stocking of this merchandise.

The Court: How much business did you do in doors?

A. Well, it represents about 75 per cent of our volume, which would be probably \$125,000 or \$150,000 a year.

The Court: How wide a territory do you cover?

A. We cover the bulk of North Carolina and the northern part of South Carolina and the southern part of Virginia.

The Court: How many accounts do you have?

A. 100 to 150.

The Court: And how long have you been in that business? A. Approximately nine years.

The Court: And how long have you been in the door business?

A. Approximately nine years.

Q. (By Mr. Prendergast): Then, as I understand it, just to see where we left off here, in the

(Testimony of Cecil Barger.)

sale of these doors you order and sell by a number or specification taken from these particular standards, is that correct?

A. That is correct, in order that the merchandise that any dealer gets from any wholesaler will always match other merchandise in his stock. Otherwise when the material were finally used in a home, if he were unable to fill an order for a particular house in a matching door, regardless of size, naturally it [10] would be very unfortunate.

Q. Do you know if architects make any particular reference to these standards and design and specifications for building, Mr. Barger?

A. They do where stock merchandise is to be used, and generally the stock merchandise for the same item—I mean for similar items such as a door of a given size would be considerably cheaper in price in a stock door than in a specially detailed door, as can readily be seen. They are manufactured on a production-line basis to the standard specifications; and, therefore, to effect economy, let's say a home, why, the architect might specify to a given standard and know exactly what he was going to get.

Q. Now, in reference to standard design, would you say that this particular, these particular standards contained in this exhibit offered for identification, are the only standards existing in the millwork business that you know that has reference to fir doors?

A. Yes, that is correct.

(Testimony of Cecil Barger.)

Q. Now, in regard to grade, does that particular exhibit now being offered have any reference to grade, Mr. Barger?

A. Yes, it gives the grades as set up by the Institute, and they have been entered as a commercial standard by the Government and generally accepted by the millwork trade.

Q. What grades are described in this particular brochure? [11]

A. They describe A grade, B grade and C grade, and one known as mill-run.

Q. And are these grades as contained in this particular exhibit generally accepted in the trade and the millwork business as being the definition and description of the grades of fir doors?

A. Oh, yes.

Q. So any reference by anyone dealing in purchasing or sale of fir doors, having a door described as A grade, B grade, C grade or mill-run, would have reference to the grades contained in this particular exhibit?

A. They would refer to this grade only, yes.

Q. Do you know of any other grade generally accepted for fir doors in the trade other than the Fir Door Institute grade? A. No.

The Court: How long has this standard existed; for the entire nine years?

A. Oh, yes, that long and much longer.

Mr. Prendergast: If the Court please, at this time the plaintiff would like to offer Plaintiff's Exhibit 10 for Identification, this particular volume.

(Testimony of Cecil Barger.)

Mr. Darling: As I understand it, you are offering it in evidence?

Mr. Prendergast: Offering it in evidence.

Mr. Darling: No objection.

The Court: Admitted. [12]

(Plaintiff's Exhibit No. 10, previously marked for Identification, was thereupon received in evidence.)

Q. (By Mr. Prendergast): Now, with reference to this F-82—and would you turn to this Exhibit 10 that you now hold—I note that you have testified that that is F-82, that it is described as a two-panel fir door; is that correct? A. Yes.

Q. Are there other two-panel fir doors with other descriptions, Mr. Barger?

A. I don't recall any—Yes, here is one described as F-28 and F-29, depending upon the width of the stile as to which it is. It is an entirely different make-up; I mean the location of the panels are entirely different.

Q. Now, when you speak of “stile” do you mean the stile of the door as a technical term or——

A. Well, stiles, (spelling) s-t-i-l-e-s, is the vertical outside members of the door.

Q. Now, what is there in the design of a F-82 two-panel door that differentiates it from any other two-panel door?

A. Well, it would have to do primarily with the location of the lock rail, which, of course, makes it a two-panel door due to the division of this panel,

(Testimony of Cecil Barger.)

and the width of that rail. Those would be the primary changes in determining a two-panel door; the location and size of the lock rail would be the main things [13] that might be changed.

The Court: Put your finger on that rail you are talking about.

A. This is the F-82 door, and this is a lock rail (indicating).

The Court: What is that first word?

A. Lock, (Spelling) l-o-c-k. It is there for strengthening of the doors.

The Court: Are those panels plywood?

A. They are plywood, three-ply panels.

Q. (By Mr. Prendergast): Now, lock rails—this lock rail, in construction are there two panels of plywood or one panel of plywood with the part that is known as the lock rail applied to it? Do I make myself clear?

A. The standard position, of course, is to have two panels, separate panels. The lock rail is full inch and three-eighths or three-quarters of the door and is grooved as the other members to receive these panels; so the lock rail is a single piece, let's put it that way.

Q. A single piece that runs right through the door? A. Yes.

The Court: How are these people in California making fir doors? Is this our Northwest fir you are talking about?

A. Yes. I have never known of a California source before.

(Testimony of Cecil Barger.)

The Court: Was that fir?

A. The bulk is fir. There are a few pine. [14]

Mr. Prendergast: I think we will clear that up a little later, your Honor, with particular reference to that.

Q. Now, Mr. Barger, in particular reference to F-82 doors, that designates a two-panel door, two separate panels of veneer interlocked or mortised into a door separated by a full thickness lock rail that is mortised into the stiles of the door, is that correct? A. That is right.

Q. And is there any particular standard as to the height of that lock rail from the floor?

A. Yes. They have specifically stated here "Height to top of lock rail from the bottom of the door" is 36½ inches. That, of course, locates it definitely. Otherwise it could vary anywhere.

Q. In other words, in a F-82 door you know the lock rail is going to be 36½ inches from the floor in all F-82 doors? A. Yes.

Q. Just in passing, has that anything to do with the striking place of the door, where the latches are placed on the door?

A. Generally speaking a latch is placed 32 to 34 inches from the floor, so it acts as a strengthening point at the place where the lock is placed.

Q. Keeping that in mind in those particular standards of design, would you refer, then, to the grade standards that are contained in Exhibit 10 that you now hold in your hand.

(Testimony of Cecil Barger.)

A. I have it here. [15]

Q. Now, would you recite the standards for Grade A F-82 fir doors as contained in Exhibit 10?

A. Well, the Grade A, "This stock shall be of 100 per cent heartwood, all vertical grain old-growth Douglas Fir, the faces which must be clear, with the exception that each stile may contain one carefully repaired pitch seam on each side, provided that such pitch seam does not extend through the piece nor exceed 3½ inches in length. Such pitch pockets shall not be over 35 inches from the bottom of the door. Bottom rail may contain one neatly repaired pitch seam the same as the stiles."

Q. Mr. Barger, what is there in Grade A standard in the observation, a cursory examination of a F-82 door, that immediately designates whether it is an A or B grade or a C grade?

A. Well, if it were an A grade it would definitely have vertical grain on all the solid wood members, the stiles and lock rail.

Q. By "vertical" is the grain not flat, and the vertical edges of the grain—

A. You see the grain, the year rings in the growth, on edge; you do not see them on the flat face. It would produce an appearance of lines, pencil-like lines in the face of the wood. There would be no flat or wavy grain. It would be very straight and parallel grain on the face of the stile.

Q. Is that true of Grade B, that is vertical wood and all solid wood—

(Testimony of Cecil Barger.)

A. It says of B, "This stock shall be of vertical grain faces, [16] with some coarse grain permitted." By that it means the space between these year rings may be wider. That is called "coarse" but still not flat.

Q. Does a Grade A or Grade B fir door, F-82 ever contain flat grain?

A. Not if it is up to grade.

Q. In other words, if it contained flat grain what grade would it be?

A. It would throw it into a C. A C, it says, "This stock may be of mixed grain"—that is vertical or flat. Naturally the vertical grain gives more strength to the door in its weakest dimension which is through the thin way, and therefore vertical grain makes it stronger.

Mr. Prendergast: If the Court please, may I have the Clerk have this photograph marked as Plaintiff's Exhibit 9 for Identification.

(Photograph of two doors, so produced, was thereupon marked for Identification Plaintiff's Exhibit No. 9.)

Mr. Prendergast: Would you please hand that to the witness.

Q. Mr. Barger, you now have in your hand a photograph that is marked Plaintiff's Exhibit 9 for Identification. Would you please identify that as to being a photograph of what.

A. It is a photograph I had made of standard F-82 door out of our stock and of A grade, and one of the doors typical of the [17] shipment that

(Testimony of Cecil Barger.)

we received in the shipment in the car in question.

Q. Looking at the photograph, Exhibit 9 for Identification, on what side of the photograph is the typical standard F-82 door?

A. The standard F-82 is on the left and the other door on the right.

Q. Now, with reference to design F-82, and with reference to grade, being A or B grade or C, would you say that that is a fair representation of a standard F-82 Grade A door on the left of that photograph?

A. Yes, that is an average door of that grade and type.

Q. And does it clearly show and is it a fair representation of the vertical grain as contained in Grade A?

A. Yes, that can be very readily seen in the photograph.

Q. Does the picture on the right of this exhibit, would you say that that was a fair representation, a typical door of not Grade A or Grade B but Grade C or lower and of not F-82?

A. Well, it is evidently not a F-82.

Q. Why?

A. Because of the location and width of the lock rail.

Q. And now as to grade?

A. And as to grade, the stiles and rails being flat grain it is evidently a Grade C or lower, and the panels, as indicated here, one showing a knot in

(Testimony of Cecil Barger.)

the face veneer and the other showing a void in the face veneer, could not even classify as a Grade C door because the faces shown of the plywood in those [18] panels is that typical of a reject side of a sound one-side grade, and would not be permitted in any door.

Q. Now, where did you obtain the door that appears on the right of that exhibit of which that is a photograph?

A. The one that isn't standard?

Q. The one that is not standard.

A. I bought it from Ruth Meyer.

Q. And that was one of the doors that was in controversy in this particular action?

A. That is true.

Q. And is it a fair representation or typical of the doors received in the car?

A. That is correct.

Q. That was shipped to you? A. Yes.

Q. Was that photograph taken in your presence?

A. Yes.

Q. And under your direction? A. Yes.

Q. And a copy has been heretofore submitted to Mr. Whitehouse or his representatives?

A. Yes, I gave one to Mr. Whitehouse.

Mr. Prendergast: If the Court please, I offer Plaintiff's Exhibit 9 in evidence.

Mr. Darling: We object to it on the ground it is not [19] properly authenticated and that the photographer who took the picture should be here

(Testimony of Cecil Barger.)

to state the circumstances under which he took it, that it was a picture that he developed and carried on in the ordinary background that you find in the introduction of pictures into court; in other words, that when it was taken the circumstances under which he took it, the development of the picture, the production of the picture.

The Court: It is admitted.

(Plaintiff's Exhibit No. 9, previously marked for Identification, was thereupon received in evidence.)

Q. (By Mr. Prendergast): You might hand those exhibits to the Bailiff at the moment. He will relieve you of them and I will proceed with a different matter.

As I understand your testimony, prior to this car which is in controversy, which car was shipped in January of 1948, your testimony is that through Ruth Meyer you purchased another car of F-82 doors.

A. That is right.

Q. And do you know who shipped that other car of F-82 doors to you?

A. You mean just these, as was typical of these cars—they move through several hands.

The Court: Which one are you talking about now, the one in suit? [20]

Mr. Prendergast: The one just prior to that.

The Court: You are talking about the one prior?

Mr. Prendergast: That is right, your Honor.

Q. I believe your testimony was that a week or

(Testimony of Cecil Barger.)

so before you had bought another car of F-82 through Ruth.

A. I don't know, but it was just prior to that we received from Ruth—it was from this Interstate or what I thought at that time was Austin Dodds.

Q. It came from Austin Dodds?

A. Yes, that is right.

Q. And was that car entirely up to standard as being F-82 doors? A. Yes.

The Court: Who is Interstate?

Mr. Darling: There is a corporation in the picture as defendant Interstate. I don't know if that is who he is referring to or not.

A. Let me refer to them as Austin Dodds.

The Court: Do you represent Interstate?

Mr. Darling: We represent the corporation, and the individual we represent was doing business under Interstate Lumber Sales.

The Court: Is there a corporation, too?

Mr. Darling: There was a corporation began in April called Interstate Lumber Sales, Inc.

The Court: And those and the individual clients the same, alter egos? [21]

Mr. Darling: No, there is a difference in ownership.

The Court: I suppose that will be developed?

Mr. Prendergast: As I understand it, it started out in January, from the records in Lane County, of Austin Dodds doing business. Austin Dodds, who had been in business for a long time, took in a partner, Mr. Whitehouse, and an assumed name was

(Testimony of Cecil Barger.)

filed, Austin Dodds Company, representing Austin Dodds and Whitehouse, and that continued in January, so far as we could ascertain. The assumed name record was there.

The Court: Who was on the shipping papers?

Mr. Prendergast: Well, it came from Austin Dodds on the shipping papers, and, so far, through the transaction, but the reason we stipulate, and we do in the pre-trial——

The Court: You don't need to go into that.

Mr. Prendergast: Austin Dodds is out of it.

The Court: Did you know Ruth Meyer personally?

A. Yes.

The Court: Where had you met her?

A. Here in Portland.

The Court: How long had you known her?

A. Approximately a year up until this transaction.

The Court: Had you done other business with her other than these two cars of doors?

A. Yes, we had done other business with her consistently.

The Court: Different items? [22]

A. Yes, but primarily doors.

The Court: Then you bought other doors from her other than these two cars? A. Oh, yes.

Q. (By Mr. Prendergast): Some three or four weeks previously you had purchased a car which proved entirely satisfactory, and as far as you knew it came from Austin Dodds, is that correct?

A. That is correct.

(Testimony of Cecil Barger.)

Q. How did you get that information that it had come from Austin Dodds?

A. As I recall, Ruth either told me or it showed on the bill of lading that we received.

Q. In reference to the payment for that car, what method did you pursue, what is the practice during this time that we speak of, as of December, 1947, or January of 1948, in the purchase of mill-work through a broker, what payment, what method of payment?

A. Well, at that time in purchasing these cars as soon as the car was shipped and the bill of lading had been stamped as received by the railroad, the originating line, then that paper accompanied by Ruth's invoice stating what was in the car were sent to my bank for collection.

The Court: Where?

A. At Statesville. A draft was drawn on our bank and these papers accompanied it, and on receipt of the papers the bank [23] notified us and we would go down and take up the draft, and on the strength of the invoice as shown and the bill of lading indicating that there was actually a car of a certain number rolling.

Q. (By Mr. Prendergast): Keeping that in mind, but with particular reference to this car we are now speaking of, which is an Atchison & Topeka & Santa Fe——

The Court: Not the car in suit?

Mr. Prendergast: Yes, the car in suit. I am directing his attention to the car in suit. I want you

(Testimony of Cecil Barger.)

to develop to the Court what happened on that, how did you hear about this lumber, approximately when, and what happened?

A. Well, I would say that Ruth called me——

Q. That is Ruth Meyer?

A. Yes. ——in the early part of January and stated that she had a car of standard F-82 doors of A grade, and gave me the specifications on the car. It so happened that these specifications suited our needs at that time and we instructed her by phone to purchase the car for us, which she directly or promptly did; and, in the due course of time, perhaps a week or ten days, the papers that I referred to, the bill of lading——

Q. May I interrupt you right there. In her conversation with you in regard to this car and the offering saying that she had that available did she make any reference at all, Mr. Barger, to the source of these doors? [24]

A. She merely stated that they were coming from the same source that the last car she had shipped me came from, not stating maybe the source itself, but I knew the source from the previous bill of lading—from the same source, and she assumed that the door manufacturer would be the same.

Q. And then after you——

The Court: She what?

A. She assumed that the manufacturer of the doors which we would receive in the second car would be the same as they had been in the first.

(Testimony of Cecil Barger.)

The Court: Who had manufactured them, the manufacturer?

A. I don't remember the manufacturer, but the fact was they were very excellent doors.

The Court: Were they manufactured in the Northwest? A. Oh, yes.

The Court: Who paid for the phone calls; each party pay for his own?

A. Each party paid for his own, depending on who called whom.

Mr. Prendergast: May I ask, Mr. Barger, are you familiar with the custom of lumber brokers or millwork brokers at that time as to whether or not they made it a practice to disclose their sources of supply? A. Generally not.

Q. And why not, if you know?

A. Well, for protection to themselves. If they disclosed from [25] whom they were buying the material, why, there was very little reason for my not going direct to that source the next time and eliminate the broker's profit.

Q. In January of 1948 were fir doors scarce in the market? A. Very scarce.

Q. And had it been difficult at that time and prior thereto during the war years to obtain fir doors? A. Very difficult.

Q. Prior to the war was it the practice to buy fir doors through brokers or——

A. No, we bought direct from the manufacturer.

Q. And then, very briefly, what happened to the

(Testimony of Cecil Barger.)

fir door business that compelled you to go through brokers?

A. Well, during the war years the scarcity of lumber, of course, was general and the manufacturer of millwork items, fir doors principally, having no mills of their own, no stands of timber of their own, depending entirely on the open market for the purchase of upper grades of lumber, the shop grades that they used to produce this millwork, were caught in the squeeze and those mills who produced lumber were able to lay aside these shop grades and offer them to the door mills and demand and receive in return the completed product due to the fact that the mill would rather stay open and run on borrowed lumber than to close entirely.

Q. So the source of lumber controlled the supply of doors? [26]

A. Controlled the supply of doors, and the source of lumber received the doors in return as soon as they were manufactured, and they, not the door mills, offered the doors to the trade in general.

Q. And I assume the doors were marked up accordingly?

A. Oh, definitely; sometimes two and three times, quite well marked up.

Q. Just with reference to that as an illustration, F-82 doors in January or February of 1948 had what marked; that is, retail.

A. Well, we—You mean what we were paying for them?

Q. No, what you were selling them for.

(Testimony of Cecil Barger.)

A. Oh, we were selling them for around \$11½.

Q. And what is the market at the present time for the same type of fir door?

A. We sell the same type of door in the same grade for, oh, approximately \$7.

Q. And that has changed, then, since 1948?

A. Yes.

Q. And are you now buying directly from the mills again?

A. Yes, we started that last fall.

Q. The brokers and the mills who supplied the lumber have been eliminated?

A. Due to the supply of lumber being available again to the mills.

Q. Now, may we get back, then—Ruth Meyer informed you she [27] had available a door, F-82 and A grade, and wanted to know if you wanted it and that it was from the same source as the door you had bought some three or four weeks before?

A. Yes.

Q. And you told her to buy it?

A. That is right.

Q. And then what happened, Mr. Barger? That was in the early part of January, 1948?

A. That is right.

Q. Then what happened?

A. Of course, the next we heard on it was the receipt of the papers indicating the car was rolling.

Q. And what was the nature of those papers?

A. Well, it was the bill of lading showing the receiving stamp of the railroad, indicating to us

(Testimony of Cecil Barger.)

that there was a car of this number moving and her invoice indicating what was in the car, these three sizes of standard F-82 A grade doors, and on the strength of those two documents we paid the draft.

Q. In reference to the bill of lading, do you know where the bill of lading is?

A. We were required to render the bill of lading to the railroad for release of the car.

Q. So you have no copy of that? A. No.

Mr. Prendergast: I might ask Defendant if they have the [28] original copy of the bill of lading.

Mr. Darling: We do not have it.

Mr. Prendergast: I wonder if I might have Counsel ask if they kept a copy of the bill of lading.

Mr. Darling: My client states that they do have a copy of the bill of lading, that the bill of lading goes along with the car, with the papers, and you customarily do not keep a copy of the bill of lading. The railroad keeps it, as stated by the witness.

Q. (By Mr. Prendergast): But, at any rate, you did receive by mail a bill of lading—May I have this marked?

The Court: You have an invoice, of course?

Mr. Prendergast: Yes. I am going to develop that in just a moment.

The Court: What is this Letter of Credit we were talking about the other day?

Mr. Prendergast: We will develop that in just a second, your Honor. This should be marked as Plaintiff's Exhibit 6 for Identification.

(Testimony of Cecil Barger.)

(Telegram by Ruth Meyer to Barger Millwork Company, dated January 12, 1948, so produced, was thereupon marked for Identification Plaintiff's Exhibit No. 6.)

Q. (By Mr. Prendergast): You have Plaintiff's Exhibit 6 for [29] Identification in your hand, Mr. Barger. Would you identify the instrument?

A. Well, it is a wire from Ruth Meyer to Barger Millwork Company.

Q. And is dated what; what date?

A. It is under date of January the 12th and states: "1500 doors \$8.40 AT&SF 149509 on way. Please send guarantee."

Q. All right, now, was that the first notice you had these doors had been shipped?

A. That is correct.

Q. And I notice on the telegram, though, Mr. Barger, that it says 15,000 doors. Is that in error?

A. That is in error. It is 1500 doors.

Q. 1500?

A. That is all that could go in a car.

Q. That is all that would go in a car?

A. That is all that could go in, loaded full.

Q. Now, in reference to the telegram, that specifically identifies the carload of doors and the Atchison, Topeka & Santa Fe freight car, the car in which these doors were shipped, is that correct?

A. Yes.

Q. By car number? A. By car number.

Q. What is the reference to "Please send guarantee"? [30]

(Testimony of Cecil Barger.)

A. Well, it had been our custom on receipt of a wire indicating the car was rolling that we would have our bank at Statesville wire her bank in Portland a guarantee for approximately the amount that the invoice would come to, I suppose which she could use in turn to get the possession of the papers without actually having the money.

Q. In this transaction, so we may develop it with the Court——

The Court: That would be treated between the banks as money, that kind of a wire.

Mr. Prendergast: That is correct.

Q. And do you know what bank Ruth Meyer was dealing with?

A. The Bank of California in Portland.

Q. And do you know from your knowledge of Ruth Meyer and her knowledge of the business whether or not she had \$12,000 in the bank at any time of her own money? A. I wouldn't.

Mr. Darling: If the Court please, I object to that. My objection is on the ground that unless he can establish from his knowledge of her banking——

The Court: He can tell what he knows.

Q. (By Mr. Prendergast): This guarantee was to enable Ruth Meyer to deal with the Bank of California on the \$12,000?

A. That is the reason she gave me, stating she was unable to handle it on her own.

Mr. Prendergast: Now, if the Court please, I would like [31] to ask the defendants to produce the original of an order which is dated January the

(Testimony of Cecil Barger.)

12th, 1948, Ruth Meyer to Austin Dodds, Eugene, Oregon. I have the copy, but the original order—and it would be Plaintiff's Exhibit 3. May I have this document marked as Plaintiff's Exhibit 3, and may I also ask the defendants to please produce the original of an order of acceptance signed by J. C. Hendrickson dated January the 14th, 1948, which is marked in the pre-trial order as Order of Acceptance, Plaintiff's Exhibit 2. I think, Counsel, that we can stipulate that both of these documents are carbon copies, but that the one that the defendant has produced bears an original signature in red pencil and the copy has a carbon copy signature, being both the same, so that this is the only original that is in existence; is that correct?

Mr. Darling: That is right.

Mr. Prendergast: May I have this document marked as Plaintiff's Exhibit 2 for Identification.

(Document entitled "Purchase Order No. 184" on January 12, 1947, so produced, was thereupon marked for Identification Plaintiff's Exhibit No. 3);

(Document entitled "Order Acceptance" dated January 14, 1948, so produced, was thereupon marked for Identification Plaintiff's Exhibit No. 2.) [32]

Mr. Prendergast: May I offer at this time Plaintiff's Exhibit 6 into evidence, which is the telegram.

Mr. Darling: No objection.

The Court: Admitted.

(Testimony of Cecil Barger.)

(Plaintiff's Exhibit No. 6, previously marked for Identification, was thereupon received in evidence.)

PLAINTIFF'S EXHIBIT NO. 6

[Telegraph Form]

Western

Union

CF9 NL Pd-Portland Org Jan 12

Barger Mill Work Co.

1948 Jan 13 AM 8 30

15000 doors \$8.40 AT&SF 149509 on way please send guarantee.

RUTH MEYER.

15000 \$8.40 AT&SF 149509.

Mr. Prendergast: Mr. Bailiff, would you hand Plaintiff's Exhibits 2 and 3 for Identification to the witness, please.

Q. You now hold in your hand Plaintiff's Exhibit 2 for Identification, which is an order of acceptance, J. C. Hendrickson, of the Austin Dodds Lumber Company, and Plaintiff's Exhibit 3 for Identification which is an order, Ruth Meyer to the Austin Dodds Company, and I ask you upon examination of those exhibits, Mr. Barger, if they refer to this particular car in controversy and this particular shipment in controversy?

A. They evidently do due to the quantities, sizes and descriptions.

(Testimony of Cecil Barger.)

Mr. Darling: If the Court please, I object to the form of the answer—I don't object to the form of the answer, but I think without further qualification that what they "evidently" do doesn't have any bearing.

The Court: Well, you know whether they do or not.

Mr. Darling: Actually, we will admit that they can come into evidence. [33]

The Court: Certainly you will.

Mr. Prendergast: I am not so concerned with that as I am with the specifications contained thereon.

Q. Now, examining Exhibit 3, Mr. Barger, which is the order of Ruth Meyer, this order, does it bear a date? A. January the 12th.

Q. 1948? A. Yes.

Q. And is headed "Ruth Meyer, Agent"?

A. Yes.

Q. And it is to Austin Dodds at Eugene, Oregon, ship to the Barger Millwork Company, Statesville, North Carolina—

The Court: Is that word "Agent" typed on there or printed? A. Typed.

Q. (By Mr. Prendergast): And is for one "C.L."—That means carload—F-82 fir doors?

A. Yes.

Q. 1500 doors at \$8.15, is that correct; and it bears some other notations that are on the original and not on the copy that I have?

A. Of course, it lists the quantities of each in-

(Testimony of Cecil Barger.)

dividual size. It says "Immediate shipment, please sign and acknowledge by returning copy of order."

The Court: You didn't see any of these papers at the time? A. No, sir. [34]

Mr. Prendergast: No, but I have reference now, I want to identify this particular car in controversy with these particular orders, if they are the same doors, and ask you if there is any identity contained on there such as car numbers or order numbers that we could trace the identity.

The Court: Oh, we know they are the cars.

Mr. Darling: We will stipulate those are the cars.

Mr. Prendergast: All right; we will eliminate that.

Q. These particular exhibits you have in your hand refer only to the F-82 doors, and the acceptance, which is Plaintiff's Exhibit 2 for Identification, contains the grade which is shown as what?

A. A grade, allowing up to 2 per cent B, it says.

Q. And does that have reference to the Fir Door Institute standards as to F-82 and the grade—Do you know of any other standards?

A. I know of no other standard it could refer to.

Mr. Prendergast: If the Court please, I offer Exhibits 2 and 3.

The Court: He and Ruth Meyer didn't exchange correspondence up to this point, just the telegrams? They didn't confirm the telephone call by letter?

A. No, sir.

The Court: Only these documents?

(Testimony of Cecil Barger.)

Mr. Prendergast: That is correct. [35]

Q. Is that correct, Mr. Barger?

A. That is correct.

Mr. Prendergast: I have offered these.

The Court: Admitted.

(Plaintiff's Exhibits Nos. 2 and 3, previously marked for Identification, were thereupon received in evidence.)

PLAINTIFF'S EXHIBIT NO. 3

Ruth Meyer

Agent

Purchase Order No. 184

January 12, 1947.

To Austin Dodds Lumber Co., Eugene, Oregon

Ship to Barger Millwork Co., Statesville, N. C.

Routing Lowest thru rate.

F.O.B. car mill.

Quantity: 1 CL

Description: F82 Fir Doors

1000 2.8 x 6.8

400 2.0 x 6.8

100 2.6 x 6.8

Price: \$8.15.

Immediate shipment.

Thanks

Please sign and acknowledge by returning copy of order.

The Court: How about the telegram of this gentleman's bank, Mr. Barger's; how about the tele-

(Testimony of Cecil Barger.)

grams from this gentleman's bank to Ruth Meyer's bank; do you have that wire?

Mr. Prendergast: We have a copy, your Honor.

The Court: And did Mr. Barger give his bank any written instructions or just oral?

A. Just oral. At my request they sent this wire of guarantee; in fact, I went down and helped them phrase it.

The Court: You will put that wire in along with the other exhibits?

Mr. Prendergast: I will put it in now and have it marked.

The Court: Has Mr. Darling seen it?

Mr. Darling: I haven't seen it.

The Court: Let him see it.

Mr. Prendergast: May we have this marked Exhibit 17, which is an additional number to the present pre-trial.

(Copy of telegram by People's Loan and Saving Bank to Bank of California, dated January 15, 1948, so produced, was thereupon marked for Identification Plaintiff's Exhibit 17.)

The Court: How was Ruth Meyer paid?

Mr. Prendergast: It was handled entirely by the Bank of California and the People's Loan and Saving Bank. They sent the guarantee.

The Court: Whom did Ruth Meyer pay for these doors?

Mr. Prendergast: Austin Dodds.

The Court: How did they pay her?

(Testimony of Cecil Barger.)

Mr. Prendergast: By a draft they drew on the Bank of California on Ruth Meyer's account, which was guaranteed by Mr. Barger's bank to the Bank of California. They drew a draft on the Bank of California.

The Court: Were the shipping papers attached?

Mr. Prendergast: Were the shipping papers—in other words, Austin Dodds in order to protect themselves did not ship this car to Barger or Ruth Meyer. They shipped to themselves, so the car was their car on the railroad to its destination, Statesville.

The Court: That is an order bill of lading.

Mr. Prendergast: And it was in their name. They did not deliver the papers until they had sight-drafted Ruth Meyer's account at the Bank of California.

The Court: They drew on her probably through their own bank in Eugene.

Mr. Prendergast: That is right. [37]

The Court: With directions to present the draft to the Bank of California, and the Bank of California had a guarantee from this gentleman in the amount so they paid the sight draft.

Mr. Prendergast: But further papers went through to identify that car and be sure they were being shipped before the money actually came on through.

The Court: The bill of lading is the only thing from Dodds to Meyer, and then Meyer attached it to her own invoice; Dodds invoiced Meyer?

Mr. Prendergast: That is correct.

(Testimony of Cecil Barger.)

Q. Is that correct, Mr. Barger?

A. That is correct.

Q. The record will show that. Plaintiff's Exhibit 17, would you hand that to the witness. You have Plaintiff's Exhibit 17 for Identification, Mr. Barger. Would you state if that is substantially the telegram that was sent by your bank that you have referred to here as being a guarantee by your bank to Ruth Meyer's bank, the Bank of California?

A. Yes, this is the wire.

Q. And would you read the telegram, please.

The Court: You don't need to. Save time. I will read them over.

Mr. Prendergast: All right. I offer Plaintiff's Exhibit 17, your Honor.

The Court: Admitted. [38]

(Plaintiff's Exhibit No. 17, previously marked for Identification, was thereupon received in evidence.)

The Court: What date is it?

Mr. Prendergast: January 15th, 1948.

Q. Now, Mr. Barger, after receiving this telegram, which is Plaintiff's Exhibit 6, this telegram to you that these doors were en route on an AT&SF car, what next did you hear about this particular car?

A. Well, we didn't hear further from the car until its arrival in Fayetteville, at which time we were notified by the freight agent there.

Q. Can you give us the approximate date of that arrival?

(Testimony of Cecil Barger.)

A. As near as I can tell, it was not before the 27th nor later than the 28th of January.

Q. 1948? A. '48.

Q. Had you done anything in regard to this car as to diverting it from its destination?

A. Yes. The car was originally consigned to us at Statesville, and in the interval between receipt of the invoice and the actual arrival of the car, as was our custom, we had made an effort to sell the doors and had sold them in and around the Fayetteville area; therefore, we diverted the car en route by notifying the agent, the Southern agent at Statesville, to get the car before [39] it arrived and divert it to Fayetteville so that our truck could disperse the doors there and save all the hauling, extra hauling.

Q. How many miles approximately?

A. Approximately 175.

Q. 175 miles. Did Ruth Meyer know that you were engaged in the wholesale millwork business?

A. Yes.

Q. And do you know if the Austin Dodds Company knew that you were engaged in the wholesale business? A. I don't know.

Q. Did you receive any, have any transaction with the railroad in regard to this particular car as to freight on the cars?

A. Yes. The car arrived and when our truck was sent to them, our men to help dispose of the doors, the amount of freight that they had informed us was due on the car, which was supposed to be paid before

(Testimony of Cecil Barger.)

the car was released to us, had proved to be incorrect. They had applied the wrong rate, so we required the agent there to release the car to our employees on receipt of a guarantee from our bank that the freight up to the amount of \$1,000, I think, would be paid on presentation of a corrected freight bill.

The Court: How much was the freight?

A. Just under a thousand dollars, nine hundred and some dollars.

The Court: Don't they go under the lumber rate? [40]

A. No, sir. Finished millwork takes currently a rate of \$1.51½ against \$1.28½ on lumber. This agent, of course, on receipt of the telegram from our bank guaranteeing the amount released the car to our men.

Q. (By Mr. Prendergast): That was at Fayetteville?

A. Yes, that was Fayetteville.

Q. What was done with the doors immediately?

A. Sir?

Q. What was done with the doors?

A. Well, they immediately began unloading the doors and distributing them, and some of the dealers who bought the doors were loaded out at the car.

Q. Now, as I understand, these doors were sold before the car arrived to customers around Fayetteville.

A. Yes, because the shortage was rather severe, and, of course, in the case of doors a man knows

(Testimony of Cecil Barger.)

what he is buying purely from a description of it. You offer him a F-82 A grade door and he knows what he is getting.

Q. In other words, you had offered your customers F-82 A grade doors that were en route to you? A. That is correct.

Q. And you diverted them to your customers at Fayetteville? A. That is correct.

Q. And you say they unloaded—you mean your truck driver?

A. Our truck driver went out to open the car and check the doors [41] out to the customers, and in some instances deliver them in our own truck.

Q. Now, were you at Fayetteville?

A. No.

Q. You were at Statesville, is that correct?

A. Yes.

Q. Then what did you hear about the doors?

A. Well, one of the customers in Fayetteville who received some of these doors called me, I think on Wednesday or Thursday, shortly after the car arrived. He was one of the first to get out of the car.

Q. That would be what approximate date?

A. I would say the 28th at the earliest.

Q. Of January, 1948?

A. Yes. And he told me the doors were not what he had ordered and requested that I pick them up and replace them with the proper type door, and was rather vague. It was on the telephone, and he was rather vague as to what was wrong. I couldn't understand.

(Testimony of Cecil Barger.)

Q. Had you seen the doors? A. No.

Q. Was your truck driver familiar with grades and specifications of doors?

A. No. He knew sizes. They were stamped on there. He knows how to unload for each size. [42]

Q. The first information you had that the doors were not F-82 Grade A, you were informed by a customer that something was wrong?

A. Something. He didn't state what. He didn't get across to me that they were not standard make-up. I gathered it was the grade he was complaining of.

Q. What did you do then, Mr. Barger?

A. I immediately called Ruth.

Q. That is Ruth Meyer?

A. Ruth Meyer. And told her there was some difficulty on the doors. I couldn't give her too much information—that the doors were objectionable to this customer, and others in the meantime—I called her on Friday of that week, I think, which is about the 29th, perhaps, or 30th.

Q. What was your conversation with her, then, generally?

A. That the doors had proven unsatisfactory and for her to contact her source and so inform them, and as soon as I knew definitely what was wrong that I would give her more definite information.

A. And that would be about Friday, the 29th of January, 1948, is that correct?

A. Yes, as I recall.

(Testimony of Cecil Barger.)

Q. And then what was the next thing that happened, Mr. Barger?

A. Well, I didn't hear anything from her over the week end and expected something in the mail Monday, and nothing showed, [43] and Tuesday, and so finally on Tuesday or Wednesday I wired her. These doors were still in possession of the customers but they were becoming quite upset about it, and I wired her to urge her to let me know something.

Mr. Prendergast: May I have marked as an exhibit Defendants' Exhibit J for Identification.

(Penciled copy of telegram to Ruth Meyer dated February 4, 1948, so produced, was thereupon marked for Identification Defendants' Exhibit J.)

DEFENDANTS' EXHIBIT J

[Telegraph Form]

Western

Union

2-4 1948

Ruth Meyer
Davis Bldg.,
Portland, Oregon

Customers insisting return doors or make adjustment promptly. Am in spot so let me know something quick.

CECIL.

(Testimony of Cecil Barger.)

Q. (By Mr. Prendergast): You have Defendants' Exhibit J in your hand. Will you tell us what it is?

A. It is a copy of a wire I sent Miss Meyer on the 4th of February.

Q. Would you please read it to us.

A. "Customers insisting return doors or make adjustment promptly. Am in spot so let me know something quick," signed "Cecil."

Mr. Prendergast: I offer that in evidence, Defendants' Exhibit J for Identification.

The Court: Admitted.

(Defendants' Exhibit J, previously marked for Identification, was thereupon received in evidence.)

Q. (By Mr. Prendergast): Now, you say that was on the 4th day of February, 1948? [44]

A. Yes.

Q. And it is your recollection that was Wednesday, or Tuesday or Wednesday?

A. Tuesday or Wednesday, must have been.

Q. And then what happened, Mr. Barger?

A. Well, shortly after that I received a letter from her which she had written on the 31st stating that she was moving as quickly as possible on this, and I think perhaps stating that she was unable to get in touch with the Austin Dodds that day, which I believe was Saturday, and would try the first thing Monday. The letter didn't come until after I had sent this wire.

The Court: We would save time if you take all

(Testimony of Cecil Barger.)

the documents and we consider them all.

Mr. Prendergast: I would like to refer to this particular one, your Honor.

The Court: Well, you don't need to have him explain them.

Mr. Prendergast: All right.

The Court: All the exhibits on both sides that have been identified on both sides as pre-trial exhibits will be deemed admitted in evidence, bearing the same numbers as in the pre-trial, subject to such objections as have been previously stated or may hereafter be stated.

Now, then, he doesn't need to talk so much about these documents. Let him tell his narrative. I will read the documents.

Mr. Darling: In this one instance I doubt if we have this [45] particular letter—I am not sure of it—Defendants' A.

The Court: You were talking a minute ago about a letter from the woman to him. You have that letter?

Mr. Prendergast: Yes, we do.

Mr. Vonderheit: Plaintiff's 11.

Mr. Prendergast: Yes.

Q. Now, you received this letter from Ruth Meyer that had been written on the 31st day of January? A. Yes.

Q. And then what next happened; in narrative style, here, tell the Court what happened.

A. Well, the next thing that happened on it was the telephone call from Mr. McLaughlin of the Aus-

(Testimony of Cecil Barger.)

tin Dodds organization to determine first-hand the nature of the difficulty.

Q. Did Mr. McLaughlin identify himself?

A. Well, he told me who he was and what firm he represented.

Q. And this Mr. McLaughlin was the same Mr. McLaughlin who was an officer of Interstate Lumber Sales, Inc., now?

A. That is the impression I had.

Q. And he had been with Mr. Dodds before he had with Mr. Whitehouse and Mr. Dodds in the corporation, so far as you know? A. Yes.

Mr. Darling: I would like to interrupt at this time. Plaintiff's Exhibit 11, the letter, we want to save an objection to on the ground that it is a letter between those two parties [46] and we have no connection with them and we feel—I don't even know what is in that letter. I can't recall.

The Court: It is admitted subject to objection.

(Letter by Ruth Meyer to Mr. C. K. Barger, dated January 31, 1948, so produced, was thereupon received in evidence as Plaintiff's Exhibit No. 11.)

Q. (By Mr. Prendergast): Can you tell us approximately when that was in reference to the date of your telegram, the 4th of February?

A. This phone call?

Q. Yes.

A. It was, I would say, within a week of the time I had sent the telegram.

(Testimony of Cecil Barger.)

Q. Had you by that time, the time of Mr. McLaughlin's telephone call, had an opportunity to inspect any of these doors yourself?

A. Yes. On receipt of the objections from our customers we—and hearing nothing from Ruth—in the meantime we sent our truck down starting Monday and started hauling the doors back into our warehouse. The customers refused to accept them, and the first load, as I recall, came in Monday night or Tuesday morning. That is the first time I actually saw the doors to determine myself what was wrong with them.

Q. That would be about the 2nd or 3rd of February of 1948?

A. Yes. [47]

Q. And then by the time that Mr. McLaughlin had called you——

A. When he called me I had seen them, I knew definitely what was wrong both as to grade and type.

Q. Just to go back a little bit, did you get back from your customers all the doors?

A. All except one customer's who was building some houses and had been waiting for doors and when they arrived they were the sizes, and since there were no other doors in the houses, rather than wait indefinitely for more doors he agreed if we would let him have them for just what we had in them he would accept them, he would accept the doors on that basis and in view of the circumstances.

Q. Had those doors been sold to him before inspection?

A. Oh, yes, they were sold while the car was en

(Testimony of Cecil Barger.)

route. All of these had been. And the remainder, twenty-nine I think, were damaged on arrival of the car which were, of course, left with the railroad. They were left with the railroad for subsequent handling.

Q. In other words, they were left with the railroad while unloading? A. Yes.

Q. And sometime after that the railroad made an adjustment?

A. Well, later we filed a claim against them and they eventually paid the claim for the net amount.

Q. In whose behalf did you file the claim against the railroad [48] company?

A. We assumed we were filing it in behalf of the shipper of the doors, since the doors, not being what we had ordered, were not our doors. We did it purely to protect his interest on the shipment. It was the only thing that could be done with them.

Q. And the money that you received, the cost that you received from the one purchaser who kept the doors, did you hold that money?

A. Yes.

Q. And for whom did you hold that money?

A. Well, for the account——

Q. For the account of the shipper?

A. That is right.

Q. Now, Mr. Barger, I want you to tell the Court what your conversation was with Mr. McLaughlin.

A. Well, he asked what the trouble was on the doors and I told him in great detail both as to design and grade and explained to him why it was that we

(Testimony of Cecil Barger.)

couldn't accept the shipment as the doors we had ordered, and he, of course, not too familiar with doors it took considerable explanation.

The Court: He hadn't seen them probably.

A. No, sir, he hadn't seen these, and perhaps had never seen a carload of doors. I don't know. He didn't talk like he had.

Q. (By Mr. Prendergast): And then what did he say to you?

A. Well, that he would go back to the mill and attempt to get [49] an adjustment and for me to hold these doors until he could let me know something.

Q. For whom were you to hold the doors?

A. Well, I presumed for him since I had told him they were not the doors we had ordered and were unacceptable.

Q. Did you tell him definitely that you would not accept the doors or did you infer that you might accept them?

A. Oh, I told him definitely I couldn't accept the doors, they were not F-82 doors or A grade.

Q. Do you deal in any other doors, cull doors or salvage doors?

A. No. We are rather envious of our reputation of handling excellent, first-quality material and have no use for it.

Q. Do you have any outlet, Mr. Barger, for salvage doors or cull doors?

A. No. We deal entirely with retail lumber out-

(Testimony of Cecil Barger.)

lets and then in turn handle only standard, recognized merchandise, and neither nor we are set up in any way to dispose of off-standard.

Q. How many days after you inspected the doors would you say it was that you talked to Mr. McLaughlin?

A. I inspected them on Monday afternoon or Tuesday morning, and I would say that I talked with him possibly Wednesday or Thursday following.

The Court: Let's see; he talked—he called you?

A. He called me.

The Court: That is the first time you knew anybody with [50] the company?

A. That is correct.

Q. (By Mr. Prendergast): And did he tell you they would get in touch with you later in regard to this?

A. Yes. I understood just anywhere from hours to days later.

Q. Did you follow that up? Did you have any correspondence or conversation with anybody about these doors after that conversation with Mr. McLaughlin?

A. Only with Miss Meyer when she would call on other items I naturally insisted that she continue to push them for settlement since she was out here and she knew them and I didn't, that she continue to try to get some settlement made, to get them to tell me what to do with the stuff. There it was taking up valuable space, and——

(Testimony of Cecil Barger.)

Q. What did you do with the doors when you got them back from your customers?

A. Well, we put them in our warehouse to store them for them. We couldn't leave——

The Court: How much profit did she have in the transaction?

A. I understood she had 25 cents a door.

Mr. Prendergast: I think, your Honor, that shows from the invoices. One is \$8.15 and the other \$8.40.

Q. In warehousing these doors were you obliged to protect them in any other manner?

A. Well, we naturally insured them for the protection of the [51] owner. If they had burned in our possession he wouldn't feel that we had hardly done the reasonable, taken reasonable precautions. We protected them and covered them for insurance for the amount that was represented by the invoice from Ruth because from our standpoint that was the amount involved, and if the doors had been lost that is the amount that we expected to recover.

Q. Actually, you got back 1394 doors; that is, some were damaged by the railroad and some this contractor retained and put in houses?

A. That is correct. The remainder was 1394.

Q. 1394 doors, and for which you had paid \$8.40 per door?

A. That is correct.

Q. And which Ruth Meyer had paid \$8.40 less 25 cents commission, or \$8.15; is that correct?

A. That is correct.

(Testimony of Cecil Barger.)

Mr. Prendergast: So, in the pleadings there is a slight discrepancy of some doors and the actual claim will be a little less. I will have to compute that.

Q. Now, Mr. Barger, how often did you talk to Ruth Meyer about these doors after that?

A. I would say on an average of once a week as she would call me on other matters or I would have some reason to call her. There was, of course, always the discussion on what was being done to get them to take them off our hands. [52]

Q. Was she authorized to effect a settlement in your behalf?

A. Oh, no, she couldn't effect a settlement. She was only asked to try to get Austin Dodds to come through with some satisfactory—in other words, to rebate us, to pay us for what he had in them and dispose of the doors or work out however they saw fit, but get them to account. You see, we were aware of no action on their part at all until a month or so later. We had no correspondence with them up till in March.

Q. In March you received a letter from Austin Dodds Lumber Company signed by Mr. McLaughlin, which is designated as Plaintiff's Exhibit 1 in the pre-trial.

The Court: He remembers the letter.

Q. (By Mr. Prendergast): Do you remember the letter, Mr. Barger?

A. Yes, very well. It was the first I had had from them.

(Testimony of Cecil Barger.)

Q. Now, in that they refer to the fact that they had a commission in these doors. Previous to that had you known where the doors had come from? Do you know now who manufactured the doors?

A. Yes, I know now.

Q. And when did you learn who had manufactured the doors?

A. Well, I learned it in subsequent discussion here perhaps with Mr. McLaughlin. I don't know when I first learned it, but I was told then they had been manufactured someplace in California.

Q. Previous to the purchase of these doors and while the negotiations were being made for the payment of these doors, and what not, had Austin Dodds at any time disclosed to you that they were agent [53] for anyone?

A. No, it was not even disclosed that Austin Dodds was the other party. It was only intimated then, and they were referred to then as the same party and not by name because I was not supposed to know of their existence other than a vague some other party.

Q. Then you received this letter of March 19?

The Court: What do you mean "the same party"?

A. Sir?

The Court: Did you just use the expression "same party"?

A. What I said was that I didn't know of the definite existence—I mean I didn't know by name who this other party was. Miss Meyer in talking to

(Testimony of Cecil Barger.)

me on the doors merely stated they would come from the same party that the last car had, not stating who it was.

The Court: But that wasn't correct, was it? Had the previous car——

A. The previous car had come through her and had been good doors.

The Court: Had they come through Dodds?

A. I later found out they had, but I didn't know it at the time.

The Court: Oh, that was a correct statement.

A. Yes.

Q. (By Mr. Prendergast): But, so far as you knew, Austin Dodds [54] sold these doors, shipped the doors, came from Austin Dodds, and you knew nothing of any other manufacturer being involved, is that correct?

A. No, I didn't know a thing beyond Dodds.

Q. And it wasn't until March 9th that Austin Dodds was then maintaining that they merely had a commission?

A. That is the first I was so informed.

The Court: Is that your contention, Mr. Darling? That word "commission" caught my ear.

Mr. Darling: Well, our contention, of course, is that the commission in their sense—They look at "commission" in an entirely different sense.

The Court: Wait a minute. Is this correct, you bought the doors from Grant and you paid so many dollars?

(Testimony of Cecil Barger.)

Mr. Darling: Yes.

The Court: You didn't get a commission from Grant and use it—It wasn't on a commission basis? You bought the doors somewhere?

Mr. Darling: Yes, sir; that is, we bought the doors from Grant in accordance with the way we wish to qualify that, that we were following the ordinary custom and trade with wholesale dealers.

The Court: I don't see that makes any difference. I want to know the fact. You got an inquiry from the Meyer woman on doors and you located the doors with Grant and when you found [55] you could buy them from Grant you told her you could get the doors and you paid Grant for the doors and you resold them to Meyer, according to your theory, at an increased sum.

Mr. Darling: Yes.

The Court: So when he uses "commission," that is not a word, that is not your word, that is his word?

Mr. Prendergast: It is a word of Mr. McLaughlin's of Austin Dodds Company, "We are quite willing to forego our commission on these doors, which is very small, in order to compensate somewhat for the doors."

The Court: Mr. Darling, he should have said profit.

Mr. Darling: Profit.

Mr. Prendergast: I don't think that matters a great deal. This letter indicates they are going to

(Testimony of Cecil Barger.)

try to do something about the thing. They say this car was a "lemon" no doubt and that is the reason it is offered.

Q. Now, after the receipt of this letter of March 9th did you hear further from Austin Dodds or from the shipper?

A. Not until about the first of July I received a letter from them.

Q. That would be a letter written on June 25th, 1948, from Interstate Lumber Sales, Inc., which changed the name from Austin Dodds, and the letterhead says Interstate Lumber Sales, successors to Austin Dodds Lumber Company, and that is a rubber stamp on this letter and signed by the same Mr. S. P. McLaughlin. Now, [56] this letter would be marked as Plaintiff's Exhibit 4. It is a letter of June 25, 1948, to Barger Millwork Company. You received this letter?

The Court: Oh, yes, that is all agreed to. All of these letters are before the Court and are received by the people to whom they are addressed. That is in the pre-trial.

Q. (By Mr. Prendergast): In this letter they stated to you, "We feel responsible for this shipment and realize you have had a tough problem on your hands in trying to dispose of this stock. We have always stood behind our shipments and in event of claim on our cars have tried to work out a settlement with the customer fair and reasonable."

Now, this refers to the fact this car was sold to

(Testimony of Cecil Barger.)

you through Ruth Meyer in Portland, Oregon, by the Austin Dodds Lumber Company, sold to you through Ruth Meyer. And then it says——

The Court: What are you reading all that for? I have to read all that.

Mr. Prendergast: I understand that, but in order to ask him a question of what he did in all this——

The Court: He knows about the letter. Now go on to the next question.

Q. (By Mr. Prendergast): After you received this letter, they said to you in this letter that they were going to refund \$915, \$300 of which was to come from Ruth Meyer and \$615 from Austin [57] Dodds, and they enclosed a check for \$615?

A. That is correct.

Q. Now, did you ever receive \$300 from Ruth Meyer? A. No.

Q. Did you ever accept the \$615 in settlement of any claim? A. No, definitely not.

Q. And did you inform them through any source that you would not accept it?

A. Well, in a telephone conversation with Ruth within a day or two of receipt of the check I told her that it was an entirely unsatisfactory settlement and for that reason there was no point in her sending the \$300, it wasn't acceptable; and she suggested that I might in behalf of Dodds offer the doors with this amount off and see if it would move them, which I did.

(Testimony of Cecil Barger.)

Q. And then early in September you—That was in July—and in September you wrote to Mr. McLaughlin and informed Mr. McLaughlin that you were returning the check for \$615 which you had not considered and would not consider, and it was impossible to sell these doors at any price, is that correct?

A. Well, I wrote the letter after having made every effort reasonable with the allowance they wanted made.

Q. You so indicate in the letter? A. Yes.

Q. And then you informed them you were coming out on the Coast. What was the purpose of the trip to the Coast? [58]

A. Well, it was to try and straighten this out I was evidently making no progress as it was.

Q. And that is when that letter—

A. And I intended to work it out at that time.

Q. And then in reply to that letter, referring to that particular letter, you received a letter back from Interstate Lumber Sales signed by Mr. Whitehouse returning to you this check for \$615, this check being a check of June 25th which is the check you had just sent back to him; they sent it back to you? A. Yes, that is correct.

Q. And stated that that was all they were going to offer you, in effect? A. Yes.

Q. Which is a letter of September 23rd, 1948, from Mr. Whitehouse of the Interstate Sales Company to Barger Millwork Company.

(Testimony of Cecil Barger.)

A. I recall the letter.

Q. Now, did you come out here, then, Mr. Barger?

A. Yes, within about a month. I came out in October and contacted Mr. Whitehouse personally as soon as I arrived and had a conference concerning the matter, and subsequently during that visit two other conferences in an effort to work the matter out on a person-to-person basis. We hadn't made much progress by letters.

The reason I didn't bother to return his check the second time, there was no point in wearing the check out. Evidently he had made up his mind that he was not going any further. So I thought perhaps if I could see him personally and explain more in detail of why the doors were not usable at all to us—He, of course, was not familiar with doors. He was a lumberman, and a F-82 to him meant nothing, I imagine. It didn't appear to. And I brought this picture for the purpose of showing him the difference between a standard door and the door they had shipped and all the other evidence that I could to convince him that what they had shipped us was worthless.

Q. What is the value of these doors that were shipped? Do they have any value?

A. Not to us because they are not the type of merchandise we are set up to handle.

Q. To your knowledge is there any possible source of sale of those doors in North Carolina or your trade territory?

(Testimony of Cecil Barger.)

A. No. If there had been, I would have suggested them to him and suggested he try to sell them.

Q. Do you know of any other means of disposing of them other than fuel? A. I don't.

Q. Did you so advise Mr. Whitehouse of Austin Dodds when you came out here that fall?

A. I told him there was no disposition from our standpoint. I suggested maybe he knew someone on the East Coast that could [60] move them, that we would like to get them out of our warehouse.

Q. Approximately what is the cost of warehousing, a reasonable charge of warehousing these doors?

A. Currently in a nearby town, Brewster, Virginia, we are paying 5 cents per door per month to store similar doors in a regular warehouse. However, in my charges here I used 2 cents a door as a figure since the other figure evidently represents a profit and what not to the concern.

Q. In carting these doors from the customers back to put them in the warehouse did you go to expense?

A. We went to expense to begin with in selling the doors. We had a man on the road for several days, and some telephone contact, and then we had expense when our truck went to Fayetteville to distribute what we presumed to be standard doors, and we had further expense when we had to send back to each of these customers and pick up and bring back to our warehouse the doors.

(Testimony of Cecil Barger.)

Q. What would you say was a reasonable charge for the, in your opinion, for the cartage that you were obliged——

A. Well, for cartage alone I would say \$350 more or less.

Q. And then when you say \$500 is a reasonable sum, that is approximately two-thirds of what the actual figure, is that correct?

A. About two-thirds of what we figure for cartage, for sale, for telephone against this material, and for insurance in the warehouse and the cost of warehousing. They take up space that [61] we are having to pay elsewhere to provide for our doors now as a result of having to store these. We are renting space instead.

Q. At what profit have you sold these doors?

A. Actually the profit ran, oh, I would say approximately a dollar to a dollar and a quarter per door, based on the price I had sold them at the time I thought I had F-82 doors. We were getting anywhere from \$1.00 to \$1.75 for panel doors at that particular period, which represented around 15 per cent over our delivered cost.

Mr. Prendergast: I believe that is all of plaintiff unless the Court has something further he would like to inquire about—Oh, I do have and will introduce a Bank of California draft for \$12,600, with exchange, which is the amount, and the People's Loan Company draft of \$12,600.

The Court: They are marked.

(Testimony of Cecil Barger.)

Mr. Prendergast: They haven't been marked.

The Court: Are those new exhibits?

Mr. Prendergast: No. They haven't been marked, but they are in the pre-trial exhibit.

The Court: All right, Mr. Darling. You may cross-examine.

Cross-Examination

By Mr. Darling:

Q. As I understand, you were familiar with the market on doors in January and February of 1948? [62] A. Yes.

Q. And had been familiar with the market on doors in 1947? A. Correct.

Q. Now, did I understand that the market was good in January? A. Very definitely.

Q. Doors were hard to get?

A. Yes, that is right.

Q. And that market was still good in February?

A. Yes, there was no appreciable decline in February.

Q. Now, what about in March? Had the market started to go down a little bit?

A. There was a decline, a rather stated decline from perhaps March all along through the early spring and summer months.

Q. And between March and June you would say there was a steady decline in the market?

A. Well, perhaps I should explain that decline. The decline was not so much in the door market as

(Testimony of Cecil Barger.)

such. It was brought about by the fact that the door mills were becoming able to buy lumber for which they did not have to furnish the doors back; therefore, there were some cars of doors developing in the open market and naturally those cars of doors having no two or three middlemen's profit added on were considerably cheaper, and it was the elimination over a period of time beginning about February or early March through to about August or September of 1948; it was the gradual elimination of these intermediate markups [63] that brought the bulk of this decline. There was an actual decline in the true legitimate market of doors at the same time from about 15 off of list to about 30 or 33 off of list, which represents about a dollar a door in actual valuation, but the major decline was the elimination of the middleman.

Q. Now, that decline was along with——

A. A market decline.

Q. ——decline in lumber generally?

A. I don't know. There never has been a tie-in between lumber and millwork as far as the fluctuation in lumber up and down the scale. It has very little effect on the millwork because the bulk of the cost of millwork is from labor.

Q. But you did tell us, did you not, that your understanding of the market was the reason the doors were scarce, and the reason they were high and the reason they were hard to get was because of the supply of lumber which the door men used to make their doors?

(Testimony of Cecil Barger.)

A. It was the availability, not the cost of the lumber, that is involved. When the mill got the lumber it was at the going market price, which was up along with all other types of lumber, but not out of reason; but, after the doors were produced, then when they turned around and let the doors go back to the lumber people it was at that point that this tremendous mark-up began to appear. It was the lumber producer who made his mark-up on the doors, not the lumber that went into them, other than is [64] normal. I mean, that was general practice.

Q. I am trying to understand your analysis of the market for what bearing it will have on the case. As I understood your testimony, the reason that the doors were high-priced was, and hard to get, went back to the situation that the door manufacturers who in turn were faced with a tough problem of getting their raw material, so to speak, for the manufacturing of the door.

A. That is correct.

Q. So that any easing up in that raw material market, or if it became harder to sell the raw material—in other words, a decline in the lumber market as such would have an effect on the manufacturing, isn't that——

A. Since price wasn't involved, it would be an indirect effect. It was the availability; in other words, lumber of this grade couldn't be bought for money. It could only be bought for service. As

(Testimony of Cecil Barger.)

many things happened back then, their availability became not a matter of how much will you pay, but what can you do for me in return; and in money the figure was not involved. It was the scarcity, the actual availability. How can you get it? You can get it by only swapping back the finished product.

Q. And that was because of the tremendous demand——

A. Oh, certainly, because of the shortage of the grade of lumber.

Q. So you wouldn't be surprised, at least, that the door market went down at the same time that the lumber market was going down? [65]

A. I wasn't surprised in the least that the doors declined to the extent they did, because we knew that when the situation changed to the extent that the middleman or middlemen that had worked their way in there were finally removed due to the availability of more raw material on the open market, why, it would occur; and the fact that it was going to occur at this time was unfortunate, information we didn't have. Because, had we been able to determine this, it would have behooved us not to buy any doors at all.

Q. Now, the door market itself, would you say that January was a good month? A. Yes.

Q. Now, then, within the period of a month would the door market fluctuate every two or three days or seven days; would the door market be good, say, one week and from your standpoint you could

(Testimony of Cecil Barger.)

buy cheaper, and then maybe two or three days later it would be higher, but then two or three days later it would go back down; is that the way it went?

A. No, it is a steady fluctuation, much more gradual than that, in part to the fact that from the time you place an order for a car of doors it will be from thirty to sixty days before they get manufactured, and it will be an additional three to four weeks before you receive them due to the length of time for them to go across the country; so, for the market to fluctuate so rapidly is rather impossible due to the slowness of ordering [66] and receiving the goods involved.

The Court: How long does it take a car to cross the country?

A. At that time it was taking three weeks and sometimes four due to the situation of railroads, car shortages, they would hold them up en route. There was considerable confusion. Normally it can go across in a minimum of two weeks.

Q. (By Mr. Darling): Now, when Ruth Meyer called you and told you she had some doors and asked you if you were interested, did she quote the price to you? A. Yes.

Q. Did she tell you the price at which she was going to be able to get them?

A. No, not at the time, because it had no bearing.

Q. Would have no bearing on your relationship with Ruth Meyer?

(Testimony of Cecil Barger.)

A. No. Her commission was of no direct effect on me. What I paid her for them is my primary interest.

Q. Now, with reference to the custom and usages, as you know them, I want to ask you to suppose the hypothetical situation that Ruth Meyer had told you that she had these doors, and, as I understand, you would tell her yes, you would like to have them, and the price was acceptable. Suppose in the meantime she had found a market 50 cents a door higher or 25 cents a door higher. Would you with your knowledge and understanding at least of the usages feel that she would be compelled to sell [67] to you?

A. I don't quite understand.

Q. Well, I will try to rephrase it. Take this actual situation that happened. Ruth Meyer called you and said, "I have a carload of doors." You said, "All right, the price is acceptable and I will take them." Now, suppose Ruth Meyer had called you a week later and said, "I sold that carload of doors to another customer of mine." Would you consider that under those circumstances that you had any claim of any type against Ruth Meyer?

A. Well, I hardly know. A thing of that type—I can't see why it would happen; if she called me and accepted my order verbally for a car of doors, I would assume I had placed an order with her for a car of doors, and why she would call me and tell me she had sold my car to someone else, it wouldn't

(Testimony of Cecil Barger.)

seem to make sense. I can't imagine what I would do under a circumstance I can't imagine arising. Why would she offer me a car of doors and not have them then?

The Court: We will recess until 1:30 p.m.

(Noon recess.) [68]

Afternoon Session

The Court: You may proceed.

CECIL BARGER

thereupon resumed the stand in behalf of the Plaintiff and was further examined and testified as follows:

Cross-Examination
(Continued)

By Mr. Darling:

Q. Mr. Barger, before lunch we were talking about how you would view this transaction with Ruth Meyer in which she told you she had a car and you said you were interested or were willing to buy the car. Now, it wouldn't have made any particular difference to you, would it, whether you got that particular car she was talking about or another car that she might have obtained from someplace else?

A. I don't think so so long as they were identical for all practical purposes.

Q. In other words, a carload of F-82 doors?

(Testimony of Cecil Barger.)

A. The only thing that might enter in there is the time element. If she offered me a car, that is in a particular position; that is, it has been manufactured, and sometimes it might even be en route, and something that has been offered to her and she offers here, there and yonder, sometimes by letter and sometimes by phone—in this case the time element entered in whereby she [69] offered by phone.

Q. But, in this particular case there wasn't any of those particular circumstances which would make any particular——

A. I assumed the car wasn't moving when she offered, but that is an assumption. It might have been.

Q. It might have been anywhere from three weeks to a month before you got the car?

A. No, she gave me definite specification, "We have this car now." Whether it was being shipped or being loaded I don't know. She just offered me the car, would I be interested. You see, I had no choice of specifying, I could take it or leave it as it existed.

Q. But as far as the shipping time—I am trying to get this clear—when you ordered I think you told us that the shipping time varies from three weeks to sixty days.

A. Oh, if you were to place an order on your own specifications.

Q. You couldn't rely on the shipping time be-

(Testimony of Cecil Barger.)

cause of the condition of the railroad lines; that is as I understand you told me. A. Yes.

Q. Now, let me go back for a minute to your testimony concerning the time that you received the doors, or I gather it was the 27th or 28th of January, 1948, those doors came into Fayetteville?

A. That is a guess on my part as being as close as I could estimate the probable time in view of the telephone conversation from the agent and so on. [70]

Q. Well, now, that would be around Tuesday or Wednesday, we will say. I am not sure, but I think the dates on Tuesday or Wednesday would be January 27th or 28th on the calendar.

A. I think that is reasonable.

Q. Then, do I understand that about the 30th you called Ruth Meyer and told her that you had heard that they weren't just right and you weren't too sure what it was but there was something wrong?

A. As I recall, it was Friday afternoon that I called her, which would be the 30th, I think, yes.

Q. And then you received sometime on Monday or Tuesday of the next week a letter from her stating something about she had—a letter dated January 31?

A. No, I didn't receive that letter until after I sent a telegram on the 4th. She had written the letter.

Q. You sent a telegram to her on the 4th?

A. The 4th, which is a Wednesday. Not having

(Testimony of Cecil Barger.)

heard anything on Monday or Tuesday as I expected, I finally wired her on Wednesday, the 4th, and the letter she had written on January the 1st, which was the Saturday prior, arrived in Statesville after I sent the telegram, either that afternoon or the following morning.

Q. Now, on the 4th when you sent this wire, as I understand, the goods, the doors were still in the hands of your customers?

A. They were being hauled back in at that time. The first [71] load was sent after on Monday. It would be about the 2nd, I suppose, and we started bringing them back in on about Monday, and I had seen the first load of those. There were about five loads to haul them back in. You see, we only got about 300 doors to the load.

Q. Now, this telegram you sent on the 4th, what did you say to her in the telegram?

A. Well, the gist of it was that I wanted her to get some action from her supplier, to let me know what to do with the doors.

Mr. Darling: Could I see Exhibit J.

A. The exact statement I used, I don't remember.

Q. (By Mr. Darling): I will hand you Defendants' Exhibit J which was introduced by the plaintiff. That is the wire that you sent on the 4th, is it not? A. That is right.

Q. Now, did that wire state something about the

(Testimony of Cecil Barger.)

doors or indicate the doors were in the customers' hands? What does it say?

A. I say, "Customers insisting return doors or make adjustment promptly. Am in spot so let me know something quick."

Q. Well, now, when did you first inspect the doors?

A. Either Monday evening or Tuesday morning, out of this first load that was returned on Monday. You see, it takes about a day for the truck to go to that area, Fayetteville area, and [72] load and return.

Q. In other words, you had received some doors before you sent this wire?

A. Yes, I had seen the doors.

Q. At Fayetteville, or the several loads?

A. This first load that had come back in, I had seen it by the time I sent this wire.

Q. Well, then, when you sent that wire you didn't mean what I might think it meant; in other words, that the customers still had the doors and were insisting on——

A. Well, this wire was sent as a result of not hearing from this telephone conversation. At the time I talked with her on the phone the customers had all the doors, and when I——

Q. But, they hadn't told you what the defects were.

A. Specifically what was wrong, no, just that they were unsatisfactory in a general way. I was

(Testimony of Cecil Barger.)

led to believe they were not up to grade, because the customers were not too specific.

Q. But at the time of this wire you had seen some of the doors?

A. I had seen them, yes, one load.

Q. And then you got your letter from Miss Meyer dated January 31 to you, or you got that letter?

A. About Wednesday morning—I mean about Wednesday evening.

Q. You mean on the 4th, the same day?

A. Either that day—later that day—any time after I sent this wire. It was right after, within a day. [73]

Q. And then following that time the customers did send back some more doors?

A. Well, you see, we had been asked by all the customers without exception to pick up the doors, and I was hoping to stall the operation until I could hear something from her, but several of them became very insistent that we take them up, they didn't want them under any circumstances at all, and those that were pushing us the hardest we started hauling back in on Monday. That is why I had already seen the doors, even though my wire would indicate just in a general way that the doors were still in the customers' hands. Part of them were and part weren't.

Q. All right, then, after the 4th you got the rest of the doors back?

(Testimony of Cecil Barger.)

A. Yes, by the end of the week they were all back in our shop.

Q. And when did you have them graded?

A. Have them graded? I didn't have them graded.

Q. Well, did you grade them yourself?

A. It shouldn't be necessary to grade doors bought out of, on standard specifications, because it is stipulated that the doors shall be grade marked. These were not, however.

Q. Did you inspect the doors then?

A. Yes, I saw them as they came in. I looked at them.

Q. All the doors?

A. Not piece by piece. I was in and out as they were unloading the trucks. [74]

Q. How many doors did you see?

A. Actually see, I would say 200 out of 1500.

Q. You saw 200 of them?

A. I would say that.

Q. Now, when you made a statement concerning Exhibit 9, which was a picture of that door of which this is a copy, that the door on the right was typical of all the doors in this shipment, you meant it was typical of the 200 doors that you saw?

A. No. I accepted the word of my employees who handled the doors one by one that it was typical. I asked them to pick out a typical one. They had seen them all and I asked them to.

Q. Then they picked out this typical door?

(Testimony of Cecil Barger.)

A. That is right.

Q. So you don't know of your own knowledge that this was a typical door?

A. Only to the extent it was typical of the 200 I saw of the 1500.

Q. That what?

A. That it was typical of the 200 of the 1500 that I saw.

Q. That is what I wanted to get.

A. No, I didn't see each individual door myself.

Q. Now, you were out here in the summer, or September, wasn't it, of '48?

A. I was here in October.

Q. October, '48? [75] A. Yes, '48.

Q. And I recall that you said that during that time you had several conferences with——

A. Mr. Whitehouse.

Q. ——Mr. Whitehouse. Did you show him the picture at the time?

A. I showed him the picture at the first conference, which was in Eugene.

Q. Was there any discussion of the picture?

A. Nothing except an explanation to the effect that that was a typical door of the group, and the purpose of the picture was primarily to show the type differentiation.

Q. Didn't you at that time say something to this effect, that "Naturally I picked out the worst door."?

A. I don't recall.

Q. Now, this conversation with Mr. McLaughlin

(Testimony of Cecil Barger.)

that you testified to, if I get the time schedule right, was that the doors came into Fayetteville January 27 or 28 and then you received a protest by phone and you called on the 29th to Ruth Meyer.

A. I called on the 30th, I believe.

Q. On the 30th, a Friday? A. Yes.

Q. And then some of the doors came in on a Monday, and you sent this wire on February the 4th.

A. Wednesday. [76]

Q. On a Wednesday. And then you got the letter from Ruth Meyer dated January 31, that day or the following day, and then the rest of the doors came in by the week end? A. Yes.

Q. And by that time you had fully satisfied yourself as to what the situation was on these doors by reason of all your men handling these doors on that week end, is that right?

A. During the week that they brought them in, yes.

Q. And the principal bulk were brought in after Wednesday, isn't that right?

A. Well, it was a continuous process, about a load a day for five days, Monday, Tuesday, Wednesday, Thursday and Friday.

Q. And it was about the following Wednesday, then, that you had this call from McLaughlin?

A. The date of the call from McLaughlin is rather vague. I couldn't state that it was within—It may have been within that same week, later that week, or the following week. It was very shortly

(Testimony of Cecil Barger.)

after this complaint had been made to Miss Meyer, and it was the first contact I had from anyone, including Miss Meyer, as to what was actually being done, I mean as to any actual action on the rejection.

Q. Now, you knew that these doors had come some way through Austin Dodds, didn't you?

A. I knew they had come from another source than Miss Meyer.

Q. Wasn't the bill of lading made out to Austin Dodds at [77] Fayetteville or at Statesville, as you mention?

A. As I recall, it was made to some other firm.

Q. And you read that when you signed it?

A. Possibly so.

Q. So you knew at the time who this person was who procured the doors?

A. It is quite possible since that was of no direct interest; besides Miss Meyer, you see, I got doors from any number of people.

Q. You mean of no direct interest because you looked to Miss Meyer who sold you those doors?

A. I didn't understand.

Q. You say it was of no particular interest to you whose bill was on this, whose name was on this bill of lading or who actually sent them because you got the doors from Miss Meyer?

A. That is right. I depended on her to buy my doors and where she got them was of no particular interest to me.

(Testimony of Cecil Barger.)

Q. And you depended on her to make any adjustment?

A. No, I don't depend on her for adjustment. There were no adjustments before this time to be made.

Q. Never had any trouble with doors?

A. Never in any particle; we never had any trouble in style, or grade, on the shipment to this, including the previous car from Austin Dodds.

Q. Which you knew at that time had come from Austin Dodds, the [78] same shipper?

A. I very likely was aware of that fact.

Q. Well, now, the only thing I want to get your information straight, you did say, I think, that you got your, you talked to Mr. McLaughlin about a week after you sent this wire to Ruth Meyer.

A. My recollection was that it was within a week of that time, not more than that.

Q. Let's put it this way, then: Was it—You really became definite in your knowledge of what these doors consisted of following——

A. On Monday, about the 2nd of February was the first date that I saw the doors and knew definitely what was wrong with them.

Q. Well, you saw some of the doors?

A. Yes.

Q. But you had no idea that they all had splits in them like that?

A. Well, the splits were not the basis of the

(Testimony of Cecil Barger.)

difficulty. I don't maintain that any but that one had a split in it.

Q. As far as you are concerned, this may be the only one that had a split in it?

A. Had a split panel; that is quite possible.

Q. Then, as far as you are concerned, your protest on the doors was that they were not F-82 doors?

A. Well, the grade. The split panel has nothing to do with the [79] grade. That split panel wouldn't be allowed in there on a C grade. That was a reject panel. It had no business in any door under any circumstance, and I don't maintain any of these other doors had it, even those that were offered in Grade C. That type panel wouldn't be allowed in any grade.

Q. You didn't check the rest of the doors?

A. No. I just assumed all the rest had good panels as far as the panels were concerned.

Q. All right, then; these doors, as far as your statement that they are typical, you are leaving out the split panel?

A. Yes, that is true; the split panel is not intended to be part of the "typical."

Q. This door that you said you took out of your warehouse, had that been treated with Rez?

A. Neither one, as far as I know, though there is a possibility the standard door had been dipped in, not Rez but some form of sealer. We had some doors that were. It was an extra charge which

(Testimony of Cecil Barger.)

didn't add anything to the door, but it's like the automobiles you bought during the war, they added everything they could.

Q. Then, in order not to take any more time on this, as I gather, you sent the wire on the 4th?

A. Yes.

Q. And then when you received a call from McLaughlin you had as of the time you talked to McLaughlin checked the doors and [80] seen the 200 doors and they were all back in your warehouse?

A. I can't state as to that fact. Mr. McLaughlin called me on his own initiative, and when I talked to him I don't believe I stated to him that I had seen all of the doors and that I knew for a fact that they were all like that. It was a logical assumption, though, in view of the fact that the men that I employed seen all the doors and they told me they were all this odd type and that the grade generally was low, but it was not a definite statement on my part that I knew for a fact at that time that they were.

Q. You mean you sent some employee over to see the customers to check the doors?

A. No. You see, our employees went to Fayetteville and took the truck to supervise the unloading, merely counting a certain door of a certain size. There was not a door of any kind in the car of F-82.

(Testimony of Cecil Barger.)

Q. Then at the time they knew they were not F-82? A. My employees?

Q. Yes.

A. But they didn't know the doors were supposed to be F-82. They were merely told to unload a car of two-panel doors.

Q. Well, you never received any but F-82 doors?

A. That is right, but they wouldn't feel particularly surprised if we did it. They had no reason to suppose we wouldn't receive some other type. They have orders for so many doors of a certain size, [81] two-panel, and that is what they filled.

Q. Did you ever state to anyone that there was about 70 per cent B grade in this car?

A. I don't recall. I would hate to make a guess of that type on it since I didn't grade them one by one. I don't think I could hardly afford to make a statement of that type.

Q. And, as I understand, you did make a claim on the doors on some damage to the doors from the railroad company and received some money for that, is that right?

A. In view of the fact that when we unloaded the car there were some damaged doors in there which evidently were damaged in shipment we left those doors with the agent with the instructions or with the statement that there would be a claim filed against them.

Q. And did you file a claim?

A. We later filed a claim.

(Testimony of Cecil Barger.)

Q. When did you file a claim?

A. Oh, it was perhaps within a week of the time we unloaded the car in Fayetteville.

Q. You had got them all back in the warehouse?

A. Well, the time there wouldn't enter into it since our filing of the claim would have followed subsequently whether we accepted the doors or didn't. It would only seem logical—we couldn't leave doors at the railroad that weren't owned by anyone.

Q. Did you ever receive more than one call from Mr. McLaughlin? [82]

A. Well, I received the one from him at that time. I don't recall him calling me any more.

Q. Did you ever call him?

A. Not that I remember.

Q. And the first letter to McLaughlin or the people that he worked for was sometime in March, is that right?

A. As I recall, I wrote a letter to him in answer to—No, I believe I wrote him a letter which his first letter answered. I was becoming rather concerned over the length of time that was passing and our not having heard anything except indirectly from Miss Meyer in telephone conversation and an occasional paragraph in a letter concerning other matters.

Q. In the meantime you had written other letters to Meyer?

(Testimony of Cecil Barger.)

A. Well, naturally on most every letter that I wrote her or every phone conversation I would make some mention of the matter and ask that she do what she could to push it. There was nothing to talk about. There was a rejected batch of doors and we wanted to know what was going to be done on it. You see, we were out the money on the doors. That was our concern. We had doors that were worthless to us and the money was paid. We were not in a very good spot.

Q. I would like to hand you Defendants' Exhibit M, and at the same time may I have the Bailiff hand these other exhibits, Defendants' Exhibits N and O. Calling your attention to Defendants' Exhibit M, is that a letter from you to Ruth Meyer?

A. Yes.

Q. Now, calling your attention to Defendants' Exhibit N, is that a letter from Meyer to you?

A. Yes.

Q. Now, to Defendants' letter O, is that a letter from you to Meyer? A. Yes.

Q. That is all on those. I wanted to identify those in the record.

Now, there seems to be a little misunderstanding between a broker and a wholesaler. Do you have any conception,—or, I will put it this way—will you please tell us what you consider the position of a wholesale lumber dealer to be under the custom and usage of the lumber trade and the door trade.

(Testimony of Cecil Barger.)

A. You mean someone in Miss Meyer's position?

Q. Someone that is called a wholesale lumber dealer.

A. Well, of course, my idea of it would be maybe incorrect in that. I am not too closely allied with that phase of the business; however, my conception of it is that they are a person who receives offers of materials of different types in carload quantities, of course, and in turn offers those commodities to some source that she knows of, or that the person knows of, that might possibly use that; in other words, maybe she is offered in this instance a car of doors and she knows of our [84] account or several of us that use doors and she offered them to us. That is what happened in this case.

Q. Then your understanding of a wholesale lumber dealer is purely an intermediary bringing two people together?

A. They don't bring them together as a general thing.

Q. In buying and selling?

A. They go to great pains to see they don't get together; however, they do serve as an intermediary and do keep the two parties secret from each other if it is possible.

Q. As a matter of fact, on that point isn't it your experience that after a wholesaler has dealt with other persons in the business for a while that then they begin to have faith and trust in them and

(Testimony of Cecil Barger.)

they don't mind telling them who their sources of purchase or supply are?

A. I suppose that would vary with the individual, how trusting he was, how much he knew about human nature.

Q. Well, now, you wouldn't be surprised in this situation with Ruth Meyer being a wholesale lumber dealer, or whatever you consider her to be, that a number of people who sold to her would know who her customer was, would you?

A. I suppose they could find out in the due course of time through some means or other. I don't believe she would tell them of her own volition, maybe.

Q. Well, to make very clear your conception of a wholesale lumber dealer—because we feel it is important to us—assume [85] that you were a wholesale lumber dealer in the situation of Ruth Meyer or a wholesaler under the customs and usages of the trade, and you purchased lumber from another wholesaler and then you sold that lumber to a customer, would you consider that you were thereby involving the customer in any contractual relationship with the one you purchased your goods from?

Mr. Prendergast: I object to that question. It is calling for a conclusion of the witness on a question of law.

The Court: Sustained.

Q. (By Mr. Darling): Now, do I understand

(Testimony of Cecil Barger.)

your interpretation of the position of a wholesale lumber dealer as far as usages and custom in the trade are concerned, that that wholesale lumber dealer is in the position as you have testified to of a broker or merely an agent for, or customer——

Mr. Prendergast: If your Honor please, I object to that. That calls for a conclusion of a point of law.

The Court: Sustained.

Q. (By Mr. Darling): Now, there has been considerable talk about this \$300 that Ruth Meyer was to give to you as part of this settlement in June that was offered by that letter of June 25th; you recall that?

A. I recall the letter stating she was going to.

Q. Now, when you were out here in October of 1948 was Ruth Meyer present at any of the meetings that you had with Mr. Whitehouse? [86]

A. She was present at the first of the three meetings, yes.

Q. At that meeting do you recall that Mr. Whitehouse asked Ruth Meyer if she had paid you \$300?

A. I don't recall the subject being discussed.

Q. Now, I believe you stated in your testimony with reference to this letter of September 23rd, 1948, written to you under the name Interstate Lumber Sales by Mr. Whitehouse, that following the receipt of that letter you stated that you knew that they would do no more, that that is all they were willing to do.

(Testimony of Cecil Barger.)

A. Well, that, of course, was an assumption on my part based on what had been said at that time. In fact, I am not certain but what the letter at least intimated that, if not stating it outright, that that is all they could do. I assumed they meant what they said. He left me feeling as if he had no intention of making any further effort in the matter.

Q. And he sent you the check on the condition you accepted the check, and that was all?

A. He sent the check back. He didn't state any conditions, as I recall, in that second letter. He merely returned the check which I had already rejected once.

Q. Now, wasn't there a difference in the way the check was sent the two times?

A. Not that I recall.

Q. Do you recall the language of the first letter of June 25th, 1948, in which it was said that this was settlement and hoped [87] that you were satisfied, and you would get another \$300 from Meyer?

A. Well, I would have to read the letter to refresh my memory so that the letter would indicate all that.

The Court: What is the difference? What is the significance?

Mr. Darling: Pardon?

The Court: What is the difference?

Mr. Darling: In the two letters?

The Court: Yes.

(Testimony of Cecil Barger.)

Mr. Darling: The position of ourselves is that there wasn't any condition attached to the letter of June 25th but there was a condition attached to the letter of September 23rd.

A. What was that condition?

Q. (By Mr. Darling): As I gather, that as you have already told us, that the condition was that this check was being sent and that was all they would do and that if you wanted to take this check then it was all over with.

A. Well, I didn't take the check, of course.

Q. You kept it, though.

A. Well, it remained in my possession to avoid wearing the thing out. It was getting rather fragile.

Q. And you have retained the check?

A. It was my intention in seeing that it stuck this time. I tried mailing and it didn't stick.

Q. Did you hand it—— [88]

A. No, I wasn't given an opportunity.

Q. Not even in the three times?

A. No, we never got around to that point. We never did get in the discussion that far. It became evident long before we got to that place that there was nothing, that the defendant had no intention of making any effort to give us any relief whatsoever, and rather than hand him the check I turned it over to an attorney along with the other file to do with what was saw fit, whatever was logical. You see, I didn't know of the legal implications. I think the defendant knew that his check was available

(Testimony of Cecil Barger.)

to him on request at any time, that it had been rejected. I don't think there was any doubt in his mind about that, as far as his getting it. He had merely to say, "Well, may I have my check?" It hadn't been cashed, he was not out his money. I was the one that was out the money.

Q. If I recall correctly, you said that shortly after receiving that letter of June 25, 1948, in which this \$615 was sent together with the statement that \$300 would be sent, as they understood, from Ruth Meyer, that you called Ruth Meyer and told her that it wasn't satisfactory?

A. Well, it so happens that Ruth had called me on another matter within a very short time, less than a week, a matter of a day or two. And in the conversation I told her that I had received this check and that it was entirely unsatisfactory as far as covering the loss that we would sustain if we accepted [89] the doors with that check, to make them right to get us our money back; and she was going to take the matter up further with them, telling them that it was unsatisfactory, and in the meantime suggested that I make an effort to sell the doors, offering them at a reduced price based on the amount that this check represented per door, which as I recall was 60 or 61 cents per door.

Q. Why didn't you call the Interstate Lumber Sales or Mr. Whitehouse or Mr. McLaughlin that you had been talking to and had had letters with?

A. I had never called him on the matter directly,

(Testimony of Cecil Barger.)

and at this stage—This was about five months after the thing had happened—the necessity for making a phone call about the matter at that stage of the game seemed a little far-fetched, and I had still—it was much simpler to tell him; she was right here in the same state; she had conversations with him, I presume, right along and could tell them in turn that it was unacceptable.

Q. You mean you had been considering her as the intermediary between you and Whitehouse?

A. In the settlement?

Q. Yes.

A. Well, hardly, because they had contacted me directly. They had by-passed her so often—

Q. Well, then, why didn't you contact them directly? [90]

A. Well, I hardly can tell you why I didn't. Why should I have?

Q. Well, it just seems a little strange to me that you at one time rely on the fact that they dealt with you directly and then at the next moment you rely on them talking to Ruth Meyer and having her contact them, and then the next moment you say, "Well, Ruth Meyer didn't have anything to do as far as I was concerned with working out this settlement."

A. Miss Meyer had been passing along information from me to them on a settlement for the handling of this disagreement on the doors for the purpose of acquainting her with what was going on.

(Testimony of Cecil Barger.)

In some instances we by-passed her like when Mr. McLaughlin called me. He called me directly. He didn't call her and have her call me. It was for the sake of finding out first-hand just what the trouble was.

Q. But you did know that she had been passing on information that she got from you to the defendants in this case?

A. Oh, we purchased the doors through her and it seemed logical to keep her informed of what was going on even though they had taken the matter out of her hands, and quite often something happened between Interstate and us that I would later write her or tell her on the phone what happened. She wasn't acted through directly, but I made an effort to keep her informed.

Q. As I understand your comment, you recognized that the information she would get from you she would pass on to them? [91]

A. It would seem logical. She would tell them since she was interested indirectly at least in seeing the matter settled. She wanted to continue to sell us doors and naturally she didn't want anything like this hanging open unsettled.

Q. That is right, and you recognized her as a funnel, a channel of information, or a funnel through which information went to them?

A. No. I recognized the importance of keeping her informed of what was done between them and us purely as information as to what was going on.

(Testimony of Cecil Barger.)

Q. Assuming that she would pass it on to them?

A. In most cases it was a direct thing, because she had to be told on the side. In this particular instance I had been instructed, as I recall, by Mr. McLaughlin in the first conversation to make an effort to move the doors for them; in other words, to move the doors in their behalf, I assumed. I had no reason to try to move them on my behalf; they weren't my doors.

Q. Were you considering Ruth Meyer as their agent in this connection?

A. As their agent?

Q. Yes.

A. I am talking about what Mr. McLaughlin told me direct.

Q. You say Mr. McLaughlin told you to go ahead and move the doors on behalf of Interstate Lumber Sales or Mr. Whitehouse? A. Yes. [92]

Q. And you continued to talk with Miss Meyer and send information to her and rely on her to pass it on and to deal with Interstate Lumber Sales. Were you then considering her as the agent of Interstate Lumber Sales?

A. You see, as far as considering who was whose agent never entered my mind. I was making an effort to be as cooperative as possible under an extremely unsatisfactory set of circumstances brought about through no fault of my own, and it was suggested to me by Mr. McLaughlin that I make an effort to——

The Court: Whose agent do you think she was?

(Testimony of Cecil Barger.)

Mr. Darling: If she was an agent.

The Court: She put "Agent" on her letterhead.

Mr. Darling: Our position would be——

The Court: I didn't ask the question I intended. Whose agent do you think she thought she was?

Mr. Darling: If anybody's, Mr. Barger's, the plaintiff in this case.

The Court: Well, that is their theory.

Mr. Darling: That is their theory, but he is adopting a position with reference to all of these matters that she had no connection with them, no agency.

The Court: What explanation do you have of putting "Agent" on there? I never saw that before.

Mr. Darling: We have no explanation. As a matter of fact, it is such an unusual thing that our witnesses will testify they [93] never even noticed it because they had dealings before and dealings after and never was the word "Agent"——

The Court: How many documents did she put "Agent" on? I have seen one.

Mr. Darling: That is the only document in which she said "Agent" within the knowledge of ourselves.

The Court: How many documents in this transaction did she put the word "Agent" on?

Mr. Darling: One.

The Court: What is that?

Mr. Darling: That is the purchase order which confirmed the actual oral order which had been given over the phone.

(Testimony of Cecil Barger.)

The Court: Purchase order addressed to whom?

Mr. Darling: Addressed to Austin Dodds, Interstate Lumber Sales.

The Court: Is Ruth Meyer supposed to be dead, Mr. Prendergast?

Mr. Prendergast: Your Honor, you probably read in the press the other day——

The Court: I am asking if she is supposed to be dead.

Mr. Prendergast: The Circuit Court of the State of Oregon says under the statute she is an absentee and are considering her to be dead in the presence of dire peril. That is all they know. The U. S. Army Air Forces says the plane has crashed eleven miles north of Shasta and two miles east of the highway, [94] and that is all.

The Court: Whom was she flying with?

Mr. Prendergast: She was flying with a P. D. Starr. They flew to Salem and gassed up, took off from Salem intending to stop at Klamath Falls, Sacramento, Oakland and Southgate, California,—that is Los Angeles.

The Court: A business trip?

Mr. Prendergast: A business trip, yes. The P. D. Starr Lumber Company had the same situation on it and took her down there for the purpose of straightening out fifteen cars of material they had bought through her here in Portland, and she left here for that purpose and nobody has seen or heard from her since. The P. D. Starr Lumber Company is in the hands of a receiver in Los Angeles.

(Testimony of Cecil Barger.)

The Court: All right.

Q. (By Mr. Darling): You say that following July, between July and September, you made some efforts to sell these doors. What did those efforts consist of?

A. They consisted of offering to our trade; that is, the retail lumber dealers that we contacted, offering these doors we presumed in behalf of the gentlemen that still owned them.

Q. Did you rent a warehouse in another city or another locality? A. No.

Q. Did you hire anybody in another locality?

A. Well, our salesmen—one is in Durham and there is one in [95] Statesville—that travel the State generally and regularly, they were instructed to offer these doors at our cost minus the presumable allowance that we were going to receive which would, if they had sold any, would have let us out whole; in other words, we would have recovered for the owner the full amount that he had in the doors in view of this proposed settlement. It was done in an effort to further the cause of the shipper.

Q. You did that in response to Ruth Meyer's suggestion to go ahead and try to sell them?

A. We presumed on further urging from Interstate, since Mr. McLaughlin had first urged us to, we presumed that he had also urged Ruth to have us continue our efforts.

Q. So you were really doing it on reliance on what Ruth told you, based on the assumption or

(Testimony of Cecil Barger.)

presumption, as you say, that Ruth Meyer had been told to tell you that?

A. Well, only indirectly. We did it on the basis of the assumption—she stated that we should continue to try on the basis,—but the fact that we did was based on the fact that Mr. McLaughlin had originally suggested that we do it and that we saw that it could possibly be no harm to the shipper.

Q. In that original oral, in that phone conversation that you mentioned some time back in January?

A. No, there is no written instructions.

Q. Is that what you were relying on? [96]

A. There were no written instructions, no written instructions.

The Court: The shipper was Grant in California?

A. Well, we didn't know that at the time. We were considering Mr. Dodds, Austin Dodds, this other outfit, as the shipper.

Q. (By Mr. Darling): Would there be any more reason for you to assume that Austin Dodds was liable to you than there would be for you to assume Ruth Meyer was liable?

Mr. Prendergast: If the Court please, I object to the question.

The Court: Sustained.

Q. (By Mr. Darling): You did know after the receipt of this letter of June 25 that the defendants in this case had gone down and made a settle-

(Testimony of Cecil Barger.)

ment as far as they could make it with the manufacturer, didn't you?

A. They stated in their letter they had. Of course, I had no way of knowing what they had done. Maybe it was true; maybe not.

Q. Then you had sold 70-some doors to this contractor? A. I had sold the entire car.

Q. I mean, you left 70-some doors?

A. One person.

The Court: Wind this up. You said you only had one more question.

Mr. Darling: All right. Excuse me.

The Court: Do you have any redirect? [97]

* * *

Mr. Darling: Call Mr. Forrest Hayworth. [103]

FORREST HAYWORTH

was thereupon produced as a witness in behalf of Defendants and, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Darling:

Q. Your name is Forrest Hayworth?

A. Right.

Q. And by whom are you employed?

A. Booth-Kelly Lumber Company.

Q. How long have you been in their employ?

A. Oh, been with them since '31.

Q. How many years have you been in the lumber business? A. Since 1908.

(Testimony of Forrest Hayworth.)

Q. During that time have you become acquainted with wholesale lumber dealers as they operate in this area? A. Yes, sir.

Q. Do you know the usages and customs of the wholesale lumber dealers' business?

A. I have my idea of it.

Q. You gained that from your experience, your own personal experience in the lumber business?

A. That is right.

Q. What is the meaning of a wholesale lumber dealer under the usages and customs of the trade as you know it?

Mr. Prendergast: If the Court please, I object to that as [104] incompetent, irrelevant and wholly immaterial to any issue in this case.

The Court: He may answer.

A. Will you repeat the question?

(Last question read.)

A. Well, a wholesaler as it works here in the Northwest is a man or a firm in the business of buying and selling lumber and other wood products such as piling, shingles and that sort of thing. From my angle, selling them, he has to be a man that has some financial stability so that I have some expectation of getting my money after I ship it. Does that answer your question?

Q. (By Mr. Darling): Now, is there any such term in the lumber business as a "lumber broker"?

A. Yes.

(Testimony of Forrest Hayworth.)

Q. What is the distinction, if you know, according to the usages and custom?

A. Well, I hear wholesalers and brokers in the same firm being called wholesalers and brokers.

Q. A distinction in the nature of the way they perform their business?

A. Not to my knowledge.

Q. Now, is there any use of the term "commission man"? A. Yes, sir.

Q. Is there any distinction between that and a wholesale lumber [105] dealer as you know the term under the usages of the trade?

A. Well, a wholesaler buys lumber for himself. A commission man buys lumber for somebody else or sells it for somebody else.

Mr. Darling: That is all.

Cross-Examination

By Mr. Prendergast:

Q. A wholesaler then would have a stock of merchandise? A. No.

Q. He buys it for himself and hasn't sold it; what would he do with it?

A. He puts it in transit and sells it in transit.

Q. Suppose he doesn't sell it in transit; it would be his property?

A. His property as far as I am concerned.

Q. Then you say a wholesaler in the lumber business in the Northwest would not have yards?

A. I wouldn't say.

(Testimony of Forrest Hayworth.)

Q. Would you say that? A. No.

Q. Some of them do have yards?

A. That is right.

Q. So a lumber company that holds itself out as a wholesaler and buying for themselves would have a stock of merchandise, would they not? [106]

A. Sometimes. Most of them do not, however.

Q. And a person who has an office with telephone and teletype and no yard or anything is called what in the lumber business? A. Wholesaler.

Q. Called a wholesaler? A. Yes.

Q. Called the same thing; there is no difference? A. That is right.

Q. And the only difference between a commission man and a broker or wholesaler is that the wholesaler has financial stability?

A. Well, not exactly.

Q. Well, that is what you said on direct examination.

A. No. I said the commission man buys for someone else, the wholesaler buys for himself.

Q. All right, now; the commission man doesn't have any financial stability then?

A. He might have.

Q. Well, you said in looking to a wholesaler you would look to see whether he had financial stability to find out whether he was a wholesaler or not.

A. No. I said I looked at the financial stability standpoint in order to be sure I get my money.

Q. Now, do all commission men disclose the sources of their supplies? [107]

(Testimony of Forrest Hayworth.)

A. How is that?

Q. Do all commission men disclose the source of their purchases at all times?

A. Well, we sometimes sell through commission men, and in that event we invoice the commission man's customer and pay the commission man after we are paid.

Q. I am not asking you that; I am asking the general practice.

A. That is my practice.

Q. You don't know the practice of others?

A. I have been at it for a good many years.

Q. All right; we will take one of these offices in the Dekum Building, Davis Building, Henry Building, that have on the door "Lumber Broker" and they send out on the teletype an offering to 300 customers. We have one carload of dimension fir green offered for sale at so much per thousand and give the dimensions. Now, what are they; are they brokers or wholesalers?

A. From your statement there I couldn't decide which he is. He might be either one.

Q. That is right. As a matter of fact, that is the way most of them did business during the war years; they made an offering to everyone that they have available and two or three brokers might offer the same material, isn't that a fact?

A. I couldn't say.

Q. You know that as a fact?

A. Well, I doubt that. [108]

Q. Did you ever have any business with Ruth

(Testimony of Forrest Hayworth.)

Meyer? A. No, sir.

Q. Did you ever know her?

A. I don't think so.

Q. Do you have a yard?

A. We have sawmills only.

Q. You have no yards? A. No.

Q. So you just saw. Now, how do you sell?

A. We sell to wholesalers and retailers and industrials.

Q. Do you sell through commission men at all?

A. Yes, sir.

Q. And where are your sawmills?

A. One is at Springfield, Oregon, and one is at Row River, Oregon.

Q. Did you ever sell to the Austin Dodds Lumber Company? A. We have.

Q. And in that particular case you sold right to the Austin Dodds Lumber Company?

A. Right.

Q. They were not commission men?

A. No.

Q. They were actual wholesalers; they sold——

A. Yes.

Q. They have a yard? [109]

A. I don't know whether they have a yard. I doubt that.

Q. You are sure they never had lumber in storage?

A. I didn't say that. I say I never knew of a yard.

(Testimony of Forrest Hayworth.)

Q. Do you know Austin Dodds? A. Yes.

Q. Do you do business with Whitehouse, now Interstate Lumber Sales? A. Occasionally.

Q. How recently?

A. Probably within the last year.

Mr. Prendergast: That is all.

The Court: Call another witness.

(Witness excused.)

Mr. Darling: Call Mr. Brackensick.

The Court: You can give me all the definitions you want to. Just go to an old NRA code and try to figure out a label and you will get about the same place you are with me to justify a definition. Or, better, get the OPA regulations which sought to define who was a broker and who was a wholesaler. [110]

R. H. BRACKENSICK

was thereupon produced as a witness in behalf of Defendants and, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Darling:

Q. Your name is R. H. Brackensick?

A. Yes, sir.

Q. And what is your business?

A. I am in the lumber business.

Q. And, just definitely, particularly, more particularly what branch of the lumber business?

(Testimony of R. H. Brackensick.)

A. I am in both the wholesale and the retail at the present time.

Q. Now, have you been in the wholesaling of lumber, doors, including doors primarily? In other words, what I am saying is, is this retail a recent addition? A. What was the last part?

Q. Was the retail business a recent addition to your business?

A. Yes, sir, more so than it had been previous to the beginning of this year.

Q. How long have you been in the wholesaling of lumber and doors?

A. Well, since about the beginning of 1946.

Q. In what area?

A. In Vancouver, Washington. [111]

Q. Now, in the year 1947 what was the approximate extent of wholesaling business that you did in lumber and doors in the amount of money?

A. Well, that would include lumber, doors and plywood, principally doors and plywood, and I'd say in 1947 approximately a half a million dollars.

Q. And in 1948?

A. Approximately \$250,000, a quarter of a million.

Q. That is the volume of the business that you transacted? A. That is right.

Q. Was that principally plywood and doors, also?

A. Yes, principally plywood and doors. There are some lumber items in there.

(Testimony of R. H. Brackensick.)

Q. Now, just tell the Court how you conducted this wholesaling business with reference to whether you buy outright and sell or how you do it.

Mr. Prendergast: If the Court please, I object as it is incompetent, immaterial and——

The Court: I don't see your point. Admitted subject to objection. Go ahead and tell how you run the business.

A. I bought merchandise in either carload or truckload quantities from jobbers, wholesalers or manufacturers.

The Court: Bought it wherever you could get it, didn't you?

A. That is right, wherever possible to obtain it. And at times I shipped cars direct from the mills and at times I loaded cars, [112] gathering the merchandise from various points. I assumed the liability, paid for the cars and sold them to either brokers, commission men, wholesalers or directly to the firms that made requests for those particular items of merchandise.

Q. (By Mr. Darling): Would you know the nature of the person you sold it to at the time you sold them?

A. Would I know the nature——

Q. Whether they were wholesalers or commission men?

A. Not necessarily.

Q. Did you ever deal with Ruth Meyer; did you know her?

A. Yes.

Q. Do you know the nature of the business that she conducted?

(Testimony of R. H. Brackensick.)

A. Well, she, so far as I was concerned, she paid me for what she purchased from me and I wasn't particularly interested whom she sold it to.

Q. Did you ever see the word "Agent" on any of the purchase orders that you received from her?

A. No, sir, I did not.

Q. Do you know whether or not any of the doors or other material that you sold to her ever went to Barger Millwork? A. Yes, sir, I do.

Q. In other words, were there one or more than such transactions during the years '47 and '48?

A. Within the two years I would say there were more than one.

Q. In other words, you knew that Barger was one of Meyer's [113] customers? A. Yes, sir.

Q. Now, during the time of your being engaged in this business did you keep acquainted with the market prices for doors?

A. Yes, sir, very definitely.

Q. Do you know what an F-82 door is?

A. Yes, sir.

Q. Does it have certain standard specifications set down by the Fir Door Institute?

A. Yes, sir.

Q. Now, did you ever deal in any doors that were not F-82 doors? A. Yes, sir.

Q. Would you tell us the condition of the market in January of 1948 with reference to whether doors were scarce, hard to get, the type of doors that were on the market?

(Testimony of R. H. Brackensick.)

A. Doors were very scarce and very difficult to obtain all during 1947 and approximately for the first three months of 1948. What else was there to the question?

Q. Pardon me just a minute. Now, with reference—when I mentioned the word “market,” what market were you thinking of? What is “market” within your meaning?

A. Well, market can be both the buyer’s market and the seller’s market.

Q. Where did you sell doors to, what portions of the United States did your doors go to? [114]

A. Oh, I sold doors to various individuals in Portland and Seattle and Pennsylvania and New Jersey.

The Court: Wait a minute. What is your position about these doors? What is the dispute, that they are not F-82 doors?

Mr. Darling: We don’t know; we never had a chance to look at them. That is part of our contention. If they had dealt with us directly and we had been a seller——

The Court: Did you sell them to Ruth Meyer for F-82 doors?

Mr. Darling: We assumed so.

The Court: Did you buy them from Grant as F-82 doors.

Mr. Darling: Yes.

Q. Now, were you familiar with the prices of doors which were not F-82 doors in the period of January and February of 1948?

(Testimony of R. H. Brackensick.)

A. Well, I had never been definitely confronted with that particular condition that I can remember.

Q. Did you ever sell any doors that were not F-82 doors? A. Yes, sir.

Q. I hand you Plaintiff's Exhibit 9, which is a photograph, purporting to be of two doors, and the one on the left has been testified to as being one that would be a standard F-82 door. Would you consider that as being an F-82 door?

A. It could be. It looks like the top panel is slightly long, according to the picture. I don't know. It may be just a case of the photograph.

Q. Now, looking at the door at the right of the picture, would [115] that be considered an F-82 door?

A. Well, it wouldn't be according to the terms of the Fir Door Institute, according to the specifications. It is a two-panel door.

Q. Now, you will notice there is a break in the lower panel on the right-hand door.

A. Yes, sir.

Q. Now, it's been testified to here by the plaintiff that he would assume that the other doors in this carload that we are concerned with did not have that crack in the panel, so the question that I am going to ask you, if you can ignore the crack in the panel and consider that lower panel to be one that is not cracked—Now, did you ever see a door similar to the door on the right?

A. I have seen doors of almost any type and

(Testimony of R. H. Brackensick.)

description that were sold during 1947 and 1948. So far as I can say, I may not have seen one exactly like it, but I have seen similar.

Q. Is there enough in this picture of the door on the right for you to state whether or not there would have been any demand for that type of door in January and February in 1948?

Mr. Prendergast: If it please the Court, Counsel will have to qualify that by saying in North Carolina, because that is where they are.

The Court: That is right.

Mr. Prendergast: You will have to ask about the market in [116] North Carolina.

A. I wouldn't know.

Q. (By Mr. Darling): Would you know about the market on the Atlantic seaboard?

A. Yes, to a certain extent.

Q. You have sold doors, as you say, in New Jersey. Sell doors in any southern states?

A. Yes.

Q. Now, then, with reference to the door on the right, do you have any opinion as to what the market price from your standpoint as a wholesaler would have been of a door similar in character to the door on the right without that cracked lower panel?

Mr. Prendergast: If the Court please, I trust that Counsel will qualify that question before it is answered. I object to it in its present form.

The Court: Hurry along now. I think he wants

(Testimony of R. H. Brackensick.)

to know if you sold that kind of a door on the Atlantic seaboard.

A. Whether I sold that type of door on the Atlantic seaboard? No, I wouldn't say I had sold that particular type.

Q. (By Mr. Darling): Well, from your general knowledge of the wholesaling business and the amount of work that you had done in the door business and your knowledge of the market and the demand for doors in January and February, what would be your expert opinion as to whether or not there would be a market for that type of a door in January and February of 1948? [117]

The Court: On the Atlantic seaboard.

Q. (By Mr. Darling): On the Atlantic seaboard?

A. I should say that up until, oh, the second quarter of 1948 that there was a market for almost any kind of a door that could have been obtained.

The Court: Including that type of door?

A. Yes, sir.

The Court: That answers your question.

Q. (By Mr. Darling): Now, with reference to that market do you have an opinion, based upon your information and experience in this business, as to what the price would be that you as a wholesaler would receive for that type of door as compared with the price you would receive for an F-82 standard door?

(Testimony of R. H. Brackensick.)

Mr. Prendergast: I am objecting to this as pure speculation.

The Court: He may answer. Overruled. What price could you have gotten for it in the first quarter of '48?

A. For a door——

The Court: Compared to the F-82.

A. Well, that is questionable, your Honor. It depends upon the scarcity of the particular buyer, his need for doors in a particular housing area.

The Court: I know what it depends upon. Can you give me a figure?

A. Yes, sir.

The Court: What figure? [118]

A. I can give you a figure of a F-82 door, a one-panel door; the price of the two-panel door was 10 cents higher than a one-panel door, and the price range was somewhere between \$7.50 and \$8.50. Now, what the particular type of door on the right which has the lock rail in the center of the door rather than placed lower would have been worth with respect to the two different doors, that depends entirely upon what the necessity was for supplying a particular job area.

Q. (By Mr. Darling): Now, with reference to the market, say, from in January and February up to the first of March, did the market and demand for doors stay about the same?

A. Up until when?

Q. Through January up until March.

(Testimony of R. H. Brackensick.)

A. I should say through January and February up until, oh, approximately the end of March the door market as far as I or we were concerned was approximately the same.

Q. What happened between that time and the end of that time and June or July?

A. The market fell off considerably.

Q. And what happened to the market for doors between July and September?

A. It became very, very slow, very bad, the demand fell off.

Q. And what happened to the market from September on? A. From September of 1948?

Q. Yes. [119]

A. Well, it was pretty bum.

Q. Is it still that way today?

A. Yes, sir. I have some doors I would like to sell.

The Court: Very encouraging. Cross-examine.

Cross-Examination

By Mr. Prendergast:

Q. When you speak of Atlantic Coast, there is quite a difference in the population center of New York and Philadelphia and the salvage areas and in North and South Carolina; in other words, it is easier to sell a cull door in a city like Philadelphia and New York than in a city of 10,000 in South Carolina or North Carolina?

A. I wouldn't necessarily say so. It would de-

(Testimony of R. H. Brackensick.)

pend entirely where the purchaser had an idea of placing the merchandise. Somebody in North Dakota might buy doors and sell them in Florida.

Q. But your probability is greater with the size of the population?

A. Oh, your possibilities are greater; yes, sir.

Q. The lumber market had a lot to do with the areas of large construction, that you could palm off any kind of a door at that time in areas of large construction like Grand Coulee when it was building, and other places where they needed lots of doors and there were no doors, they would take anything?

A. I would say there were some awfully bum doors that went to [120] California.

Q. As a matter of fact, when you sold your doors you sold them under the Fir Door Institute grade, did you not?

A. Sometimes, and sometimes not.

Q. But you never sold any door under the Fir Door Institute grade and delivered something else, did you? A. No, sir.

Q. Did you have a yard in Vancouver?

A. Yes, sir.

Q. And in the lumber business you dealt with anybody that wanted doors? A. Generally.

Q. Now, this half-million dollars worth of business, probably 80 or 90 per cent of that was on plywood, wasn't it?

A. No, I wouldn't say so.

(Testimony of R. H. Brackensick.)

Q. As a matter of fact, there was lots of plywood at a high price and very few doors in 1948?

A. We obtained quite a few doors.

Q. But would you say that most of your business was in plywood?

A. Well, now, I wouldn't definitely—but, I wouldn't say most of it; no, sir.

Q. Before you came here to testify, did you check up to see if you had sold some doors to Barger through Ruth Meyer?

A. Yes, sir.

Q. And what was the source of those doors?

A. Where was the source of them?

Q. Yes.

A. Well, if I recall, there was one car that was secured direct from the manufacturer.

Q. Who was that?

A. Acme Door Company.

Q. Acme Door Company?

A. Yes.

Q. Now, was that after January or before January of 1948?

A. I'd say that was before January of 1948.

Q. And where was the other one? Any cars from Robinson?

A. No, sir. I think there was a car that was secured from—well, I think they originally came from M & M.

Q. Did you ever ship any doors to Barger through Ruth Meyer that were not fir doors?

A. Now, that I wouldn't definitely know. It is possible there may have been some spruce and hemlock in the construction of some of the doors.

(Testimony of R. H. Brackensick.)

Q. But you don't know?

A. I don't know definitely.

Q. But any fir doors that you shipped you shipped under the Fir Door Institute standards; in other words, using their descriptions and standards?

A. Generally so, yes. If they were F-82 doors, they were under the standards. [122]

Q. From the picture you have in your hand could you tell the grade of the door on the right? Notice the grain and stile, is that Grade A or B?

A. Well, I'd say that the door could be B or C.

Q. As a matter of fact, the Fir Door Institute says there is nothing but vertical grain and stiles in a Grade B, does it not?

A. That I wouldn't know, sir.

Q. You are not familiar with the grade in the Fir Door Institute?

A. I am to a certain extent but not too familiar so that I would be able to make that statement.

Mr. Prendergast: That is all.

Redirect Examination

By Mr. Darling:

Q. Was there a correlation that you know of between the lumber market as a whole and the time between January and September of 1948, and the door market as far as whether it was going down?

The Court: He means, did they both go down together.

A. In 1948?

(Testimony of R. H. Brackensick.)

Q. (By Mr. Darling): Yes.

A. Between what months?

Q. Between January and September.

A. Of 1948. Yes, I would say that there was a variation in the ability to purchase better grades of lumber at a more reasonable price and that the same was true about doors.

The Court: All right. Put another short witness on before [123] we recess, if you have one.

(Witness excused.)

Mr. Darling: Call Mr. Lytle.

FRANCIS A. LYTLE

was thereupon produced as a witness in behalf of Defendants and, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Darling:

Q. Your name is F. A. Lytle? A. Yes.

Q. Ordinarily known as Al Lytle?

A. That is right.

Q. What is your present business and occupation?

A. A buyer, strictly, for Interstate Lumber Sales.

Q. In other words, you are employed by Interstate Lumber Sales, the corporation?

A. That is right.

Q. Now, in January of 1948 were you an em-

(Testimony of Francis A. Lytle.)

ployee of Interstate Lumber Sales—Withdraw that question.

In January of 1948 were you an employee of Mr. Whitehouse doing business as Interstate Lumber Sales?

A. Well, I wouldn't say as an employee.

Q. What was your connection then? [124]

A. Strictly the location of lumber, you might call, on a finder's fee or a commission.

Q. Would you speak louder so we can hear it down here? As I understood, you said you were what is called a finder, you were finding lumber for a commission? A. That is right.

Q. You didn't receive any salary?

A. No, sir.

Q. Did you find lumber for more people than Interstate Sales? A. No, sir.

Q. You were exclusively working for them?

A. Yes, sir.

Q. But your entire reward or remuneration was on a commission basis, is that it? A. Yes, sir.

Q. Now, what was the condition of the market in the early part of January or throughout January in so far as the availability of doors?

The Court: What is the point?

Mr. Darling: On the availability of them.

The Court: This whole thing of market, what has this to do with it?

Mr. Darling: We think it has a real thing to do with it, because as we see the picture during the

(Testimony of Francis A. Lytle.)

time that the doors were scarce and it looked like there was a sale there was no rescission [125] or attempted rescission by Mr. Barger, as our testimony will show, but the efforts towards rescission came when the market was out, the bottom dropped out, and found themselves with a carload of doors, and if we had had definite notice of rescission back in January when they say that they gave it to use we could have disposed of the doors.

The Court: Well, do you mean you are going to dispute the testimony about the telephone conversation?

Mr. Darling: Very definitely.

The Court: And the first letter is dated what?

Mr. Darling: The first letter we consider says he rescinded this contract is September, 1948.

The Court: What is the first letter objecting to the doors?

Mr. Darling: The first letter we have directly from him I believe was in March, the 9th, of 1948.

The Court: When did he get his doors?

Mr. Darling: He got the doors on January 27 of 1948.

The Court: When does he say he had this telephone call from your man McLaughlin?

Mr. Darling: He would say sometime after February 4th.

The Court: Are you going to deny that conversation?

Mr. Darling: We will admit there was a con-

(Testimony of Francis A. Lytle.)

versation and have testimony as to what occurred.

The Court: Are you going to admit your man called him?

Mr. Darling: Yes. [126]

The Court: All right; go ahead.

Q. (By Mr. Darling): The question I asked you is what was the situation of the door market in so far as availability of doors in January of 1948.

A. Well, doors were very hard to secure from any market and it was just practically an impossibility. You just located doors anywhere you could get doors and you put in a lot of time trying to find doors. Doors were very, very scarce.

Q. Now, you have heard us talking, you know what carload of doors we are concerned with in this case?

A. Yes, sir.

Q. Now, were you acquainted with Ruth Meyer?

A. Yes, sir.

Q. Well, will you just tell the Court what the facts were as you know them as far as this particular carload of doors. Let me introduce it by saying, are you the one that found this particular carload of doors?

A. I am.

Q. All right; now, tell the Court concerning the transaction with Ruth Meyer.

A. Ruth Meyer called the morning of the 10th and asked if we had any doors, if I had any doors, or any material to offer, or had located any, and I told her I had been offered the previous day this carload of doors and gave her the description,

(Testimony of Francis A. Lytle.)

amount, and told her it was subject to prior sale, and she said, well, [127] she would see if she could find a customer and call me back.

Q. Did she call you back?

A. I left and I went back out in the field. She had called back my wife.

Q. Now, what position does your wife play in your business?

A. As secretary, she takes care of all phone calls and everything when I am not there.

Q. Does she make any memorandum of those phone calls? A. Yes.

Q. Now, then, what did you then next do when you found out she wanted the doors?

A. On my return I called her and told her—in the meantime, the next morning we had a letter saying she would accept the doors, she had a market for them. I had called, informed the Eugene office relative to the doors and that she wished the doors, and they sent a copy of, she sent a copy of her invoice to me and one to the Eugene office, a purchase order for this car of doors.

Q. Now, on that purchase order did you notice whether or not it had the name “Agent” typewritten under her name?

A. I did not at that time.

Q. Had you ever had any prior dealing with Ruth Meyer? A. Yes.

Q. And was she listed on her stationery and purchase orders as a wholesale lumber dealer? [128]

A. Yes.

(Testimony of Francis A. Lytle.)

Q. And had you ever seen the name "Agent" on any of these correspondence or purchase orders?

A. No, I hadn't.

Q. Had you ever had any dealings with Ruth Meyer after this particular carload?

A. Yes, sir.

Q. And did you ever see that name "Agent" on any of the others? A. No, sir.

Q. When she talked to you with reference to this order did she—and gave you the oral order—did she state that she was an agent?

A. She did not.

Q. Now, what was the next information—or, just tell the Court what happened next as far as you know on this particular transaction.

A. Well, the transaction was completed as far as I knew. There was nothing more on it until I returned from a trip. My wife had taken a notation from Ruth that she had a phone conversation from Mr. Barger that——

Q. With Mr. Barger?

A. Well, she said from her customer.

Q. You mean Ruth Meyer said?

A. Ruth Meyer. A complaint on the car of doors, that they were B and C doors, that they were not A and B doors, and that she [129] wished, her customer wished an adjustment on the car of doors.

Q. Now, did your wife make a memorandum as far as you know of that particular conversation?

A. Yes, sir.

(Testimony of Francis A. Lytle.)

Q. She is here available for testimony?

A. Yes, sir.

Q. She will be able to testify as to the way she made that memorandum? A. Yes, sir.

The Court: Where is your office?

A. At my home.

The Court: Portland?

A. Yes, sir.

The Court: How long had you known Ruth Meyer?

A. From July, 1947.

The Court: How long had she been in the lumber business, do you know?

A. I don't know, but previous to that she had a partner in another name.

The Court: In the lumber business?

A. Yes, sir.

The Court: Here in Portland?

A. Yes, sir.

The Court: She an unmarried woman?

A. I think so. [130]

The Court: Is that her unmarried name, Ruth Meyer?

A. Yes.

The Court: Do you know what previous experience in the lumber business she had?

A. No, I do not.

The Court: How old a woman was she?

A. Oh, I would say thirty-three or thirty-four.

The Court: Do you know about what volume of

(Testimony of Francis A. Lytle.)

business she did when she went in for herself?
Were you ever around her office?

A. I was around her office on several occasions.
She seemed to do considerable business.

The Court: What building was her office in?

A. In the Davis Building.

The Court: Where is that?

Mr. Prendergast: The building is the old building on Third & Stark, across from the liquor store there.

The Court: Oh, I see.

Q. (By Mr. Darling): Did you have any further conversations later with reference to this particular transaction, this complaint? Tell the Judge what further conversation you had with Meyer.

A. On several occasions after that Ruth and I discussed the claim, and she asked me if I thought the original claim of 40 cents a door was too much due to the delay we were having in [131] getting a settlement from the door manufacturer.

Q. Now, you say the original claim of 40 cents a door. What do you mean by that?

A. That is the claim that she asked for in her first, original conversation with my wife.

Q. Did she ever tell you as to whether or not Barger felt that that was the proper settlement?

A. She did.

Q. What did she say?

A. Well, she thought that 40 cents would be a legitimate claim.

(Testimony of Francis A. Lytle.)

Q. She thought, but did she tell you that Barger told her that?

A. Yes, sir, her customer.

Q. And was that a face-to-face conversation?

A. Yes, sir.

Q. Well, now, when she asked you whether 40 cents, whether you thought 40 cents was too much, what did you say to her? I didn't get that.

A. Well, I told her I wasn't sure whether it would be a legitimate claim or wasn't. I had never seen the doors, but if there was a defect or grade wasn't up that 40 cents was not an unreasonable claim and if we could get more for her from the door manufacturer and what we would contribute and what she would contribute we would do everything for her customer we could.

Mr. Darling: That is all. You may cross-examine. [132]

Cross-Examination

By Mr. Prendergast:

Q. You are the F. A. Lytle who was Vice-President of the Interstate Lumber Sales Company, are you not? A. Yes, sir.

Q. And you were in the process of organization of the Interstate Lumber Sales, Inc., in February of 1948, were you not, about the time of this transaction; Whitehouse had bought out the interest of Dodds and was incorporating? You had put in, you owned 50 shares of the capital stock of the company and you did that in January of 1948, didn't you?

(Testimony of Francis A. Lytle.)

A. Either February or March. I wouldn't say that.

The Court: We will take a short recess.

(Short recess.)

The Court: Finish this up.

Q. (By Mr. Prendergast): As I understand, Mr. Lytle, you testified you are what is known as as finder for Interstate Lumber Sales in 1948, is that right?

A. No. The Austin Dodds Lumber Company at that time.

Q. It was Austin Dodds Lumber Company at that time. You had worked for Austin Dodds for more than a year, had you not, prior to that time?

A. I started in '47, yes.

Q. And so in January it was still Austin Dodds but was being transferred to Mr. Whitehouse. And in February you started [133] organizing the Interstate Lumber Sales, Inc. You subscribed to 50 shares of capital stock and were nominated as Vice-President of the company. That was concurrent with this transaction, was it not?

A. No, sir. That was in March, April when we incorporated.

Q. The Articles of Incorporation, the charter was finally granted in April? A. April 1st.

Q. Now, your testimony was that on January 10th of 1948 Ruth Meyer called you in Portland at your home. A. That is right.

Q. And you are sure of that day?

(Testimony of Francis A. Lytle.)

A. Yes, sir.

Q. And asked you if you had any doors?

A. Yes, sir.

Q. You knew Ruth Meyer at that time and had known her some time and had been in her office in the Davis Building? A. Yes, sir.

Q. Her office in the Davis Building consisted of one room with a number of telephones in it, did it not? A. It consisted of two rooms.

Q. Well, there was an entrance as you come in the door, a glass partition, and you go into the other room and there was a desk where the stenographer sat?

A. Office girl in the first office. [134]

Q. And you had been up there a number of times, had sold her, through her, merchandise before, had you not? A. Yes, sir.

Q. And, as a matter of fact, some three weeks before that you had sold her a car that Austin Dodds had from Robinson Company?

A. Well, there were several cars previous to this, just previous to this one.

Q. F-82 doors manufactured by Robinson Company, sold by Austin Dodds through you and through Ruth Meyer to the Barger Lumber Company?

A. I wouldn't say they were Robinson's doors, no.

Q. But you remember selling a car of doors?

A. They came from Washington through an-

(Testimony of Francis A. Lytle.)

other wholesaler and we would have no way of knowing.

Q. But that was three weeks before this transaction in January?

A. Shortly before this transaction.

Q. All right; now, when Ruth called you you told her that you had at that time, on January 10th, you had another car of F-82 doors, did you not?

A. That is right.

Q. And you gave her a price on them?

A. Yes.

Q. You gave her the specifications of the car?

A. As they were given to us, as they are on the order.

Q. You had them right there, one thousand "2.8 x 6.8's" and [135] four hundred "2.0 x 6.8's" and one hundred "2.6 x 6.8's" two-panel F-82 doors. That is what you told her was in the car?

A. That is right.

Q. And she said that she would see what she could do with them? A. That is right.

Q. And you called your Eugene office then; that is Austin Dodds Company, isn't it?

A. That is right.

Q. And you called them and in the meantime Ruth had called your wife back on the 11th of January and said she had placed that car, had a customer for that car?

A. It was either on the 10th or the 11th.

Q. Either the 10th or the 11th she told your wife

(Testimony of Francis A. Lytle.)

that so you called your Eugene office then and told them about that and they said they had received an order from her for it.

A. I won't say, recall back that they said they had an order from her at that time.

Q. Well, what did you tell the Eugene office?

A. Well, relative to other material that I had picked up in the field or located. There was conversation sometimes every day, and sometimes we would miss three or four days.

Q. At this conversation, after your wife called, Miss Meyer called and said she had a customer for this car, and you called your Eugene office—now, what was said to your Eugene office about this call?

A. I might have called the Eugene office relative to whether they had done anything with it or other material.

Q. You said you did call them about this car. I don't know what you called them about. What did you call them about? Did you tell them Ruth Meyer had a customer for this car, had placed an order with you?

A. She hadn't placed an order, no.

Q. Did she place the order with you at any time, Mr. Lytle, or did she place it with the Eugene office?

A. She placed it with the Eugene office. I had a copy of it.

Q. You got a copy back. That is dated January the 12th and is Plaintiff's Exhibit 3. And you got a copy of the confirmation of that order and acceptance by J. H. Hendrickson, Austin Dodds Lumber Com-

(Testimony of Francis A. Lytle.)

pany, dated January 14th, confirming the fact that they had accepted this order for the car to be shipped to the Barger Millworks? A. I believe so.

Q. Now, you knew the Barger Millwork Company because a car had been shipped to them before, didn't you?

A. We had shipped several cars to them before. I presumed this was going to the same place.

Q. And Ruth told you this car was *going the* same place?

A. No, she didn't. She referred to her customer, not Barger Millwork, when we were discussing this order.

Q. On the 12th of the month you got a copy of her order saying [137] it was going there?

A. No. At the time it was offered to her she didn't know who she was going to——

Q. Did I misunderstand you to say she was your agent to sell that car? A. No, sir.

Q. Did Ruth Meyer have any lumber yard that you know of? A. Not to my knowledge.

Q. As a matter of fact, her entire place of business was the office in the Davis Building, wasn't it?

A. That is right.

Q. I am handing you Plaintiff's Exhibits 2 and 3, which is the order and acceptance of the order. Now, when did you first see that order from Ruth Meyer?

A. Well, it would have been the following day or the day after when it would come to me.

(Testimony of Francis A. Lytle.)

Q. All right; now, is it your testimony that the word "Agent" was not on there at the time, or did you just testify that you didn't see it?

A. I didn't see it.

Q. You wouldn't say it wasn't on there?

A. I wouldn't say it wasn't on there.

Q. As a matter of fact, that has been in your possession ever since, or possession of the Austin Dodds Company, until it was produced on my demand this morning in open court, is that right?

A. That is right.

Q. Now, you went away, then. This was on the day after the 12th when the order was placed and you went away and you came back; now, you say your wife and Ruth Meyer had had some conversation?

A. Yes.

Q. What was the date of that conversation?

A. That was on the 30th, January the 30th.

Q. On the 30th? And the conversation that Ruth Meyer told your wife at that time that the complaint about the doors was that they were B and C grade and not A and B grade, and that was on the 30th of January?

A. That is right.

Q. And that was the only complaint?

A. No, no.

Q. What was the other complaint?

A. Well, that she wanted an adjustment of 40 cents a door.

Q. And that was on the 30th of January?

A. That is right.

(Testimony of Francis A. Lytle.)

Q. They wanted 40 cents a door on the 30th of January; now, you are sure of that?

A. Yes, sir.

Q. And Ruth Meyer then at that time asked you if that was a reasonable adjustment?

A. A short time after that. [139]

Q. How long after that?

A. Oh, I would say a couple of weeks afterwards.

Q. A couple of weeks afterwards?

A. Two weeks afterwards, three weeks.

Q. Now, did you have any further conversation with Mr. McLaughlin or Mr. Whitehouse about this shipment?

A. Well, from time to time to the fact that they were trying to make an adjustment with the mill.

Q. Let me ask you this, Mr. Lytle: You say on the 10th when Ruth Meyer called you up and you told her you had a car of these doors—where did you have that car of these doors?

A. This car of doors was offered to us by a man by the name of Johnson that had dealings with the door factory in Sacramento, California.

Q. Now, what did you have to show that you had that car of doors, that you could offer them for sale?

A. We didn't have anything.

Q. Didn't have anything? A. No.

Q. When did you purchase that car of doors from Johnson?

A. Johnson had no dealing in the car only that he made the statement if we could sell the doors

(Testimony of Francis A. Lytle.)

his friend—we should call Sacramento and call the door factory direct.

Q. Whom did you get your commission from?

A. Austin Dodds Lumber Company. [140]

Q. Austin Dodds Lumber Company?

A. That is right.

Q. And what did Austin Dodds Lumber Company pay for these doors? Do you have the invoice from the mill?

A. Yes—no, I don't have it here.

Q. Have you seen it?

A. Yes, I have seen it.

Q. What did they pay for these doors?

A. \$7.60, I believe.

Q. And what was the grade on that invoice?

A. A and B.

Q. What was the design? A. F-82.

Q. Is that invoice in the possession of your company now, the Interstate Lumber Sales, Inc.?

A. I don't know.

Mr. Prendergast: May I ask Counsel if they can produce that invoice?

The Court: They will look for it. Go ahead with the examination.

Q. (By Mr. Prendergast): Did you at any time go down to the mill in California, Mr. Lytle?

A. No, sir.

Q. You had nothing to do with any negotiations between Austin Dodds or Whitehouse and this mill in Sacramento? [141] A. No, sir.

(Testimony of Francis A. Lytle.)

Q. Do you know if Austin Dodds or Austin Dodds' successors, whoever they might be, had sold lumber, that is fir lumber, to this mill in Sacramento?

A. I don't know if they sold any lumber. Not to my knowledge.

Q. You don't know that? A. No.

Q. You said the first conversation you had with Ruth Meyer after placing the order was she asked for 40 cents, is that correct?

A. That is correct.

Q. And the first conversation was after you returned after she had a conversation with your wife?

A. That is right.

Q. And that was on the 30th of January?

A. My conversation wasn't the 30th of January.

Q. But your wife's conversation was?

A. Yes, that is right.

Mr. Prendergast: That is all. Before I finish with him I would like to have the invoice to question him.

The Court: He will be here. I see Mr. Patrick. Is he one of your witnesses?

Mr. Darling: Yes.

The Court: Do you want to call him now?

Mr. Darling: Mr. Patrick. [142]

C. C. PATRICK

was thereupon produced as a witness in behalf of Defendants and, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Darling:

Q. Mr. Patrick, what is your business?

A. Principally wholesale lumber business.

Q. How long have been engaged in that business? A. Over thirty years.

Q. And where has your office been during that time?

A. All the time in Portland, Oregon.

Q. And in the course of being engaged in this business have you sold lumber throughout the United States? A. Yes.

Q. Bought and sold lumber throughout the United States? A. Yes.

Q. Now, in this case, Mr. Patrick, first—I will withdraw that statement and ask you, during your thirty years or more of experience in the wholesale lumber business have you become acquainted and familiar with the usages and customs prevalent in this business? A. Yes.

Q. Now, in this particular case there is some question as to what the function of a wholesale lumber dealer is, and for that purpose we have asked certain people that we think can qualify [143] as experts by reason of their knowledge of usages of the business to come in and testify, and we will

(Testimony of C. C. Patrick.)

now ask you if you will tell us what a wholesale lumber dealer is and what position he plays in the lumber trade.

A. Well, as distinguished from a commission lumber salesman, a wholesale lumber dealer buys and sells whatever product he is handling for his own account. Some wholesalers have both yards and also ship direct from a mill to their customers. Others are known as direct mill shipment wholesalers and they have no yards, but in the course of a number of years' business there is very few of them that get by without having a yard of some nature with anywhere from a hundred thousand to several million feet in it.

Q. Do you have a yard? A. Yes.

Q. Now, during the years of '47 and '48 and earlier years were there a number of wholesale lumber dealers that did not have yards?

A. Yes. We did not have one in those years—yes, we did—Oh, in '47 and '48—we did not have them during the war period.

Q. How does a commission man transact his business?

A. He acts as either an agent for the producer or the customer and whichever one he acts as agent for he receives a commission from them. He does not invoice—he gets a copy of the invoice, [144] if they give it to him, to complete his records to see that his order has been filled.

Q. Now, under the usages of the trade when a

(Testimony of C. C. Patrick.)

customer buys through a commission man does the customer pay the commission man or pay the person from whom the lumber is obtained?

A. Under normal conditions the customer pays the shipper of the lumber and the commission man collects a commission from the shipper.

Mr. Darling: That is all. You may cross-examine.

Cross-Examination

By Mr. Prendergast:

Q. Now, you spoke about "under normal conditions" that is done. That would imply under abnormal conditions the other practice is followed of arranging with a bank or financial institution to handle the transaction by paying through the account of the agent.

A. Wait a minute. I don't follow you.

Q. Let me ask it this way: Isn't it a fact, Mr. Patrick, that these so-called brokers, that is people who have offices and telephones who takes orders and supply them made it a practice during the scarcity of millwork not to disclose their source of supply on scarce items like plywood, doors, and things of that nature, isn't that right?

A. I think a lot of them tried to, but if they had known how it was handled they would know they didn't disguise anything. [145] Anybody can trace a shipment if he wants to, provided he has a friend in the railroad office.

(Testimony of C. C. Patrick.)

Q. That is right. In other words, they would have to go to the trouble of going back?

A. Why, if a mill would ever disguise where it was we always trace. We want to know where it was made and what type of lumber.

Q. We are talking about millwork, not lumber.

A. That would be the same thing.

Q. And isn't it a fact that in such practice which was followed during that period of time that where a broker had no financial responsibility; that is, where they had nothing—they had an office and a telephone—that instead of——

A. Well, now, are you speaking of a broker or a wholesaler?

Q. I am speaking of a person who has an office and telephone, has no yard, and who takes, calls up some lumber company and asks them if they have any doors, and the lumber company says yes—and, now, whatever we call that——

A. I am not calling, but if he does that and doesn't finance it he is a broker and not a wholesaler. A wholesaler assumes responsibility and buys and sells and invoices it.

Q. In other words, financial responsibility has a lot to do with it if it is financed by the man himself?

A. No, it doesn't make any difference how he is financed. Let him finance himself, whatever way he can, but he assumes [146] responsibility for the order. He assumes responsibility with the customer for selling it; he then is a wholesaler.

(Testimony of C. C. Patrick.)

Q. As a matter of practice, if you were going to sell \$14,000 worth of lumber to somebody in an office in "X" building in Portland and they had only a telephone, you would check their financial responsibility or require payment before delivery, would you not?

A. Yes, or have a guarantee of payment anyhow.

Q. Now, as a matter of fact, in the lumber business it is very easy to ascertain, is it not, the financial responsibility of anybody in the lumber business through the Lumbermen's Credit Association?

A. You can get their ratings, yes. Those ratings are not always correct.

Q. But you can get any rating, they rate everybody doing any business?

A. They rate anybody they have any record of.

Q. That is correct; and, as I say, the practice not only in the lumber business but in any good business would be before you sold somebody \$14,000 worth of merchandise would be to see if they could get the \$14,000 to pay for it.

A. Well, we sell export quite frequently and don't pay any attention to the credit of the customer.

Q. That is export? A. Yes. [147]

Q. How do you protect yourself?

A. We have an irrevocable letter of credit before we accept the order.

Q. That is the same thing as credit; in other words, you demand credit from somebody that will stand good for it?

(Testimony of C. C. Patrick.)

A. We have an irrevocable letter of credit in a bank in Portland and San Francisco.

Q. That is your assurance you will get your money? A. That is our insurance, yes.

Q. That is right, your insurance that you will get the money. A. That is right.

Mr. Prendergast: That is all.

Mr. Darling: Could I ask one question?

Redirect Examination

By Mr. Darling:

Q. In the determination of financial responsibility, if you had dealt with a person listed as a wholesale lumber dealer on a number of occasions and had received your money, that would be some assurance to you that you would get your money, wouldn't it, past dealings?

A. Well, it depends what their rating was. We sell lots of customers a single car that have no rating in Dun & Bradstreet's or the Red Book, but we do have a personal knowledge of their integrity. I feel safer selling an honest man with no rating than I do a crook with a good rating. [148]

Mr. Darling: All right.

The Court: Do you want to call the lady now?

Mr. Darling: Yes, Mrs. Lytle.

(Witness excused.)

MRS. F. A. LYTLE

was thereupon produced as a witness in behalf of Defendants and, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Darling:

Q. Your name is Mrs. F. A. Lytle?

A. Yes.

Q. And you are the wife of the one we know as "Al" Lytle who just previously testified?

A. That is right.

Q. Now, will you state what your position was in your husband's business back in January of 1948?

A. Well, technically speaking, I don't have any position. It is just when he is away from the house I try to help him by taking all phone calls, and since I don't know anything about the lumber business I write down everything that is said because I am not a judge of whether or not it is important; so I keep a little book and write down all phone calls and he checks that book when he returns to the house. [149]

Q. As a part of established procedure of his business, then, when he is away you keep track of all phone calls and make a memorandum of what is said?

A. Yes.

Q. And you have that little book with you?

A. I have it.

(Testimony of Mrs. F. A. Lytle.)

Q. Now, did you at some time on or about January 30th, do you have any memorandum that is in connection with this particular transaction, any conversation or phone call from Ruth Meyer?

A. Just before office closing, just shortly before 5:00 o'clock on the afternoon of January 30th I had a phone call from Ruth Meyer and she said she had just talked by phone with her customer, Mr. Barger, I believe, and that he was dissatisfied with a carload of doors he had received.

Q. Do you have the memorandum that you wrote at the time? A. Yes, I have.

The Court: Show it to Mr. Prendergast. Have you seen it, Mr. Darling?

Mr. Darling: Yes, I have seen it.

Mr. Prendergast: For a matter of the record only, it is hearsay, but I recognize the situation we are in, so I don't urge it too strongly other than it is hearsay.

The Court: Go ahead, Mr. Darling.

Q. (By Mr. Darling): Now, Mrs. Lytle, will you tell us what that memorandum says that you have entered as of January 30th? [150]

A. Well, I can read it.

Q. Is it in your handwriting?

The Court: You better get at it the other way. Does she have an independent recollection——

Mr. Darling: All right.

Q. Do you have an independent recollection of what that memorandum says?

(Testimony of Mrs. F. A. Lytle.)

The Court: No. The conversation.

Q. (By Mr. Darling): Of the conversation?

A. Well, my recollection was simply that the customer was not satisfied with the contents of the car. He asked for a rebate or a refund and mentioned 40 cents as being an acceptable figure. Now, she didn't say he insisted on 40 cents; she merely mentioned 40 cents as being an acceptable figure. Now, I don't know whether that would mean for a suggestion that we should come back with a 40-cent offer——

The Court: And you wrote down right away what she said?

A. Yes.

The Court: And that is in the book?

A. Yes.

The Court: Would you like to offer the book?

Mr. Darling: We offer the book in evidence.

The Court: Admitted subject to the objection.

Mr. Darling: In view of the objection we would be willing in order to save our record to allow her testimony to go in. [151]

The Court: That is already in. It has to be marked, Mr. Clerk.

(Black notebook, so produced, was thereupon marked Defendant's Exhibit P, and was received in evidence.)

(Testimony of Mrs. F. A. Lytle.)

DEFENDANT'S EXHIBIT P

3:50 p.m. Ed Bartholic—using office space & phone of Griswald & Swithers, 504 Dekum Bldg., At. 7654.

Brought order etc. and left subject to your approval.

5:35 Robert Smith wants you to call him tonight—before 10:30 or 11:00 or in the morning.

Friday [1-30-48—notation in pencil]

Francis home.

4:50 Ruth has claim on last car of doors. Should be F-82. Are: 2 panel not F-82. Grade A 2% B, 70% B with C D from Grant Mfg. Co., Calif. Price concession and refund wanted. Lock rail centered on Panel. 4" instead of 7 $\frac{3}{4}$ ". Customer now has doors warehoused. (Mentioned 40c as acceptable refund.)

Ruth wants widths on shiplap 8-10 or 12". Meiter says flooring is as follows 1 car now loaded others to follow at 10 to 14 day intervals. He wants orders on his 5 cars of clears.

11:15 a.m. Ruth Meyer order: Im. shipment 1 car 1 x 3 flooring—Ship to Western Seaboard Lbr. Co., Fontana, Calif., Santa Fe Del. [A.T.&S.F.—notation in pencil]

12:40 B. J. Adams order: in 14 days 1 car 1 x 3 flooring. Ship to Hogan & Van Gelder, 621 Bay Shore Blvd., S. F., Cal. G.N.W.P. Del. (Western Pacific Del.)

(Testimony of Mrs. F. A. Lytle.)

(You were supposed to call Mr. Adams this morning—what happened?)

Dick Meiter phoned that flooring wouldn't all

Defendant's Exhibit P—(Continued)

be 1 x 3. There would be some 1 x 4.

Change OK with Adams.

OK with Ruth if one open account.

OK with Bartholic & Rake Bros.

Mr. Darling: Would it be under the rule permissible to have that one page taken out and return the book?

The Court: Yes, the one page. Do that later. Continue the examination.

Q. (By Mr. Darling): Did you ever have any further conversation with Ruth Meyer on this matter?

A. Well, I would say probably, because I talked with her quite often, but I don't recall specific instances.

Q. This is all you know about this transaction, then, within your own knowledge, is that it?

A. I believe that is all that pertained to this particular transaction.

Mr. Darling: That is all.

Cross-Examination

By Mr. Prendergast:

Q. Now, as I understand it, on Friday afternoon, January 30th, 1948, Ruth Meyer phoned you and wanted to talk to Mr. Lytle. You informed her he

(Testimony of Mrs. F. A. Lytle.)

wasn't home. She said she had just heard from Barger in North Carolina. A. Yes. [152]

Q. And Barger said that he was not satisfied on the car of doors because they should be F-82, and they are two-panel not F-82. You wrote that down?

A. That is right.

Q. And that they were graded 2 per cent B and they were 70 per cent B with C and D's in it; that is what Ruth Meyer told you?

A. That is what Ruth Meyer said and that is what I wrote down.

Q. And that they wanted a refund or price suggestion which she suggested?

A. That is right. It was my understanding that the suggestion of the 40 cents was Mr. Barger's suggestion.

Q. Now, wait a minute; I am just asking you now what you wrote down. You wrote down as she talked to you, you wrote down what was said?

A. Yes.

Q. And this lock rail, centered down the panel, four inches instead of seven and three-quarters inches. The customer now has the doors warehoused.

A. That is what I understood her to say.

Q. That was on the 30th of January?

A. Yes, and——

Q. And then you have parenthetically "40 cents an acceptable refund." Ruth Meyer said that?

A. I understand it was Mr. Barger's suggestion, but Ruth Meyer [153] suggested it. After all, I didn't have any conversation with Mr. Barger.

Q. But you put that down at the time; you put the other conversation down. That is all.

(Witness excused.)

Mr. Darling: Call Stewart McLaughlin. [154]

STEWART McLAUGHLIN

was thereupon produced as a witness in behalf of Defendants and, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Darling:

Q. What is your name?

A. Stewart P. McLaughlin.

Q. And by whom are you employed?

A. Interstate Lumber Sales, Inc.

Q. Are you an officer of that corporation?

A. I am.

Q. And what is your position with the corporation?

A. I am the sales and office manager and Secretary-Treasurer of the corporation.

Q. Now, you do all those duties, do you?

A. I do.

Q. Back in January of 1948 for whom were you working?

A. J. L. Whitehouse.

Q. And just for him individually, is that it?

A. And, before him, Dodds and Whitehouse.

Q. You worked for Mr. Dodds of Austin Dodds Lumber Company before that?

A. I did.

Q. In January of 1948, at the time of this ship-

(Testimony of Stewart McLaughlin.)

ment of doors or this order of doors that we are talking about in this case, [155] what was your position? A. As sales and office manager.

Q. And what did your duties consist of?

A. Oh, managing the office, selling, getting our circulars, generally trying to sell lumber.

Q. With reference to his particular order from Ruth Meyer, in order to save a little time, do you recall this particular order? A. I do.

Q. And you are the Mr. McLaughlin that has been mentioned here a number of times as having phone conversations and letters? A. I am.

Q. All right; now, you just tell the Court what you know about this particular order of Ruth Meyer, from Ruth Meyer on this carload of doors; how did you first hear about it and what did you do?

A. Well, "Al" found out there was a car of doors for sale. It was offered to him subject to prior sale, and he did mention to the office about it, and later on he sold it and when it had been sold he let us know about it on the phone and we got the car under way by wiring the mill that had the car offered out.

Q. Did you handle the various financial transactions in connection with this particular order; was that part of your function? A. Yes.

Q. Did you pay the—

A. There was nothing out of the ordinary.

Q. I mean, that is part of your duties?

A. That is part of my duties.

(Testimony of Stewart McLaughlin.)

Q. Did you pay the manufacturing company in California?

A. I paid the First National Bank at Eugene. They drew on us on sight draft and the sight draft come in.

The Court: What was attached to the draft?

A. Attached to the draft was an invoice of the mill and a bill of lading, probably an order bill of lading.

The Court: Do you have the invoice here?

Mr. Darling: I have it here. We will offer this.

The Court: I don't suppose they started this car until they got a return on the draft, do you think?

A. I think they started the car when they had a firm order. And they protect themselves by taking the money on a draft.

The Court: Well, they are not protected until they get a return on the draft.

A. They still own the car, though.

The Court: Well, the bill of lading would come back to them if the draft were not paid; that is your point?

A. That is right.

(Invoice of Grant Manufacturing Company, dated January 12, 1948, to Austin-Dodds Lumber Company, so produced, was thereupon marked [157] received in evidence as Defendants' Exhibit Q.)

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RECEIVE

Grant Mfg. Co.

FORMERLY CRAIG & PLUMMER CO.

Door Manufacturers

PHONE 9-0313

P.O. BOX 67

3610 RIO LINDA BLVD.
DEL PASO HEIGHTS, CALIFORNIA

Inv.

7441

DATE January 12, 1948

TAKEN BY _____

DELIVERY WANTED _____

TERMS 2% Sight Draft

ORDERED BY _____

NAME Austin-Dodds Lumber Company

MAKING
ADDRESS _____

CITY Eugene, Oregon

Car No. AT&SF 149509

Route - SM WP DRG CB&Q Southern Delv.

DELIVER TO

Douglas Fir Lumber

1,006 - 2-8 x 6-6 Two Panel Doors

@ \$ 7.00

\$ 7,045.80

400 - 2-0 x 6-6 " " "

@ 7.00

3,040.00

93 - 2-8 x 6-6 " " "

@ 7.00

757.95

1 - 2-6 x 6-6 One " "

@ 7.00

7.00

\$11,400.00

Less 2%

228.00

\$11,172.00

2% B Doors

EXHIBIT

Case No. 4322
D.B. G. HOLCOMB

Reporter

DATE OF DELIVERY

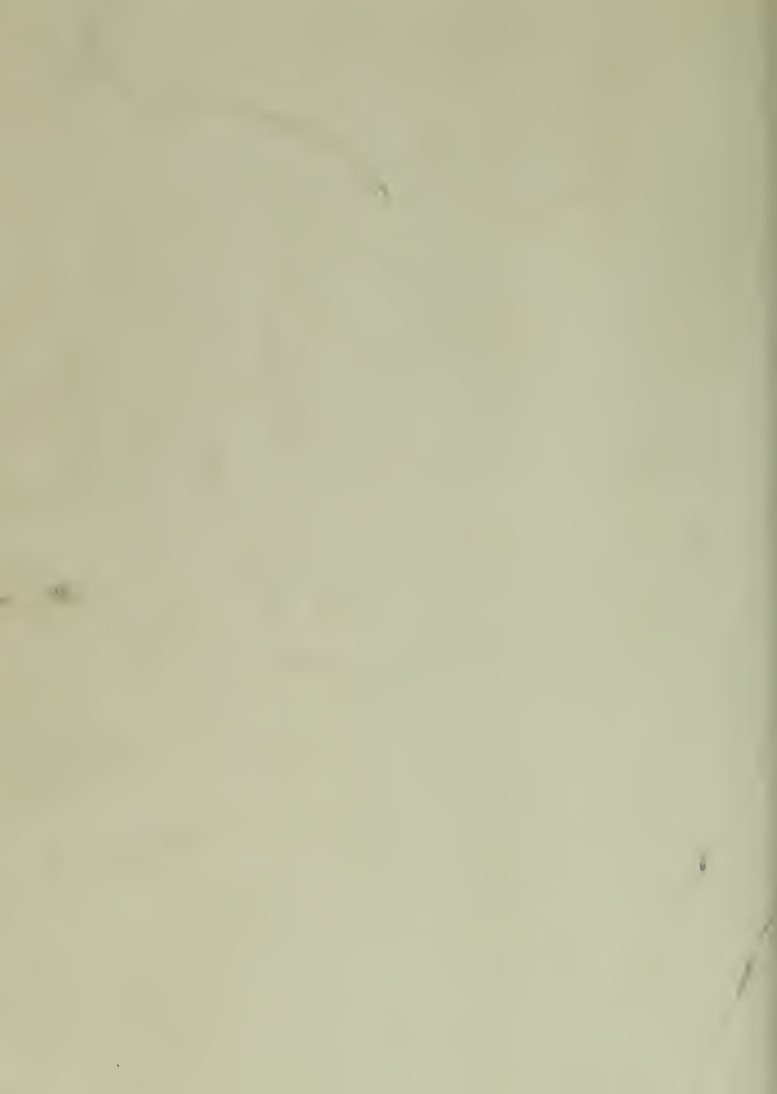
DELIVERED BY

RECEIVED IN GOOD ORDER BY

SALES TAX

TOTAL





(Testimony of Stewart McLaughlin.)

Q. (By Mr. Darling): Did you institute the order from the California concern before you received your written order?

The Court: What does an order bill of lading mean? I have heard it discussed. You might state it again.

A. An order bill of lading is a bill of lading covering a car, and on that bill of lading part of the terms are that the car is not to be set in or delivered to the customer until the railroad has the bill of lading; in other words, that is an order that prohibits, different from a commercial bill of lading. That order bill of lading prohibits the railroad from setting that car in until they get possession of the bill of lading back.

Q. (By Mr. Darling): Do I understand as soon as you received the oral information that this order was made by Ruth Meyer that you contacted the manufacturer?

A. We wired them.

Q. By wire? A. Yes.

Q. Told them to ship them? A. Yes.

Q. And you would follow it with your confirmation of the order? A. That is right.

Q. Now, when did you first hear about any difficulty with this car? [158]

A. "Al" called and stated that there was a claim on the car.

Q. Now, did you get a letter from Ruth Meyer?

A. Later on.

(Testimony of Stewart McLaughlin.)

Q. When this purchase order came in, the written purchase order, did you notice that she had put in typewriting the name "Agent" underneath "Ruth Meyer"? A. No.

Q. Had you had prior dealings with Ruth Meyer?

A. Quite a few dealings with her.

Q. Did you consider her as a wholesale lumber dealer? A. Yes, we did.

Q. And dealt with her on that basis?

A. We did.

Mr. Prendergast: If the Court please, the questions are a little bit leading; the testimony is coming from Counsel rather than the witness.

The Court: He feels this is an important witness and doesn't want you to lead.

Q. (By Mr. Darling): I hand you Defendants' Exhibit H. Did you receive the letter that that purports to be from Ruth Meyer?

A. Yes.

Q. As far as the information you obtained from that letter, what did you understand to be the claim by Ruth Meyer?

Mr. Prendergast: If the Court please, the letter speaks [159] for itself. I object to him——

The Court: Sustained.

Q. (By Mr. Darling): Now, following the receipt of that letter and the request for an adjustment in price that is mentioned in the letter, what did you do?

(Testimony of Stewart McLaughlin.)

A. Well, I called up Barger, the customer.

Q. When did you call him?

A. About February the 4th.

Q. Now, you heard Mr. Barger testify before and he seemed to be not too sure when the call was. Have you any way of knowing that the call was on February 4th?

A. I checked the telephone record and that is the date of the call to his town, and we have no other customers in his town.

Q. Did you have only the one call with him?

A. That is the only one I could find, yes; that is the only time I talked with him.

Q. What was the purpose of the call?

A. Well, as a matter of policy we like to get to the bottom of something like this because we are standing next to the mill or the shipping mill and to go back on them for any kind of a complaint you have to have the facts and you save time and confusion to try to ascertain the facts rather than through a third party, and in some cases there might be more—we go direct to the person who is filing the complaint so that we have first-hand information to go back on the mill to see if we can [160] work out something on it.

Q. Do you remember the time of the day that you made the call?

A. It was late in the afternoon here because I got Mr. Barger at home.

Q. Now, you heard Mr. Barger testify as to the

(Testimony of Stewart McLaughlin.)

nature of that conversation, and you tell the Court what the conversation was.

A. Well, I called him, told him who I was, who I was representing, and just asked him what the trouble was. And he said that the doors were pretty much off-grade, in fact, the bulk of them were B grade, and there would be a scattering of maybe better grade, and the balance of them were lower; that is, lower than B grade. He complained that they were bought for 2 per cent B and better, and they were not, and I talked to him and told him that I would go back on the mill and see if I could get him some price adjustment on the shipment, which I did.

Q. Well, now, did he at the time tell you that he was returning those doors or offered to return the doors? A. No, he didn't.

Q. Did he tell you that he was rescinding the contract that he now claims?

A. No, he did not.

Q. Did he tell you that he was holding the doors for you? A. He did not.

Q. Did you ask him at the time?

Mr. Prendergast: Of course, these questions are very leading, [161] your Honor. I am sorry to interrupt, but I think he could approach it in a different manner without leading the witness.

Q. (By Mr. Darling): Tell us what he said with respect to—I will withdraw that. Tell us what you said with respect to asking him to act in any

(Testimony of Stewart McLaughlin.)

way as your agent in the selling and disposing of these doors.

A. No. I told him, after listening to his complaint, that I thought I could get an adjustment on the price from the mill that shipped it, and that I would try to do that and, as I recall, that terminated our conversation.

The Court: Did the mill make an adjustment?

Mr. Darling: \$300.

Q. Tell the Court what efforts you made thereafter in regard to getting an adjustment from the mill.

A. Well, I called the Grant Manufacturing Company and I got Mr. Craig or his partner. I could never get them together, but I would get one or the other.

The Court: Gray?

A. Craig.

The Court: What was the name of the firm?

A. Grant Manufacturing Company. And they, as I would get one or the other of these men, they would promise to take the matter up with the other party and work out a settlement. They apparently were never able to get together and quite a bit of time lapsed since I had talked to Mr. Barger, and finally we [162] sent down a representative of ours who was stationed at Yreka to go down personally and see if he couldn't stop the runaround we had been getting. He did that and was down in Sacramento or Del Rio for several days. He got a check.

(Testimony of Stewart McLaughlin.)

He took it up with the mill company's attorney who advised him that the mill itself was on rather shaky ground and that he had best take the check that they had given and call himself well off. They gave him the check too late to cash in Sacramento. He didn't have time to stay down there any longer so he mailed the check back to Eugene and I collected it or entered it for collection. I thought I could collect it a little quicker, and I asked the bank to notify us in the event that the check bounced at Sacramento. Apparently the stickers or tickets that they put on those requests going through fell off and we didn't hear anything, and we checked the bank every day, and at the end of about two weeks we figured the check the millwork company had given us was good and we could then go out and work a settlement on the car.

The Court: Did the check go through?

A. Apparently it did. I haven't seen it since.

Q. (By Mr. Darling): Now, at the time you were making these efforts with the Grant Manufacturing Company did you understand the situation to be that 40 cents on a door would be an acceptable——

Mr. Prendergast: Now, if the Court please, this is pure [163] leading, and Counsel is doing all the testimony here and I object.

The Court: Sustained.

Q. (By Mr. Darling): All right. At the time you were making these attempts to obtain an ad-

(Testimony of Stewart McLaughlin.)

justment in price with the Grant Manufacturing Company what did you understand the situation to be, the situation concerning the demand of Ruth Meyer or Barger in so far as a settlement of their claim on this carload of doors was concerned?

A. Well, in talking it over with Mr. Lytle and after talking to Mr. Barger—he painted a pretty black picture on those doors—and I went at it that probably if I could get him the freight, or a dollar a door that it would more than satisfy his demands.

Q. Did you know anything at the time about any offer or suggestion of an amount per door by Ruth Meyer or Mr. Barger which would be an acceptable settlement?

A. Mr. Barger and I mentioned no amounts, and I would say it was after my conversation with him that I learned that 40 cents a door would be acceptable.

Q. I would like to hand you here Plaintiff's Exhibit 5. Do you recognize what that is?

A. I do.

Q. What is it?

A. That is my letter to Bill Robb, who is our man in Yreka [164] that went with the invoice, Grant's invoice. I sent that to him down in Yreka and hoped I had made it strong enough that he would go down to Sacramento and see what kind of a settlement could be made. This letter was written after it was quite apparent that we could not pin down any of the either owners or partners

(Testimony of Stewart McLaughlin.)

of this Grant Manufacturing Company over the phone.

Q. Did you write a letter in June of 1948, June 25—I hand you Plaintiff's Exhibit 4. What is that letter?

A. That is a letter written by me to Barger Millwork Company stating what we had done, what we had been able to do in regard to the settlement of this particular car.

Q. Well, now, with that letter did you send a check in the amount of \$615? A. I did.

The Court: We know that is it.

Mr. Darling: It is Defendants' Exhibit I.

Q. And you signed it Interstate Lumber Sales, Inc. by your own name? A. I did.

Q. This Defendants' Exhibit K, a copy of a sight draft on the First National Bank, or order of First National Bank of Eugene, \$12,225, will you tell the Court whether that is a copy—You have seen it, have you not, Defendants' Exhibit K, the check—Would you like to look at it?

The Court: That is all covered. That is what you paid to [165] the mill?

Mr. Darling: No, I think to Ruth Meyer. Just tell the Court how you were paid, how Interstate Lumber Sales was paid on this account.

A. We drew a draft on Ruth Meyer, Bank of California, Portland, and took this.

The Court: How did you happen to send it to the Bank of California?

(Testimony of Stewart McLaughlin.)

A. Probably knew she banked there.

The Court: Had you drawn on her before, had transactions with her before?

A. I don't believe. We might have a previous car of doors; lumber, no. This draft, or the original of this draft, was tied to our bill of lading and an endorsed bill of lading deposited in the First National Bank of Eugene.

The Court: Endorsed what?

A. Endorsed order bill of lading.

The Court: That is the one you got from California?

A. That is right, the same one, and deposited in our bank and they in turn sent it to Portland and collected the money for us. When it come back, they put the money in our account.

The Court: Well, the car was rolling at that time? A. It was.

Mr. Darling: The Court asked concerning payment to the Grant Manufacturing Company. We have an order draft on that [166] and we would like to have it marked.

The Court: Let Counsel see it.

Mr. Darling: That is in conformance with the bill of lading.

(Sight Draft to the order of Grant Manufacturing Company dated January 13, 1948, so produced, was thereupon marked for identification Defendants' Exhibit R.)

Q. (By Mr. Darling): I ask you what that is, marked for identification R.

(Testimony of Stewart McLaughlin.)

A. How is that?

Q. I ask you what that document is that is marked Defendants' Exhibit for Identification R?

A. That is a sight draft drawn by the Grant Manufacturing Company on Austin Dodds Lumber Company covering the car.

The Court: Covering this car of doors?

A. This car of doors, yes.

Mr. Darling: We offer it in evidence.

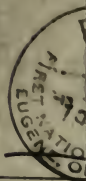
The Court: It is admitted.

(Defendants' Exhibit R, previously marked for identification, was thereupon received in evidence.)

CUSTOMER'S DRAFT.

Value received
 To Mr.
 Thru

PR-204 12-41



Case No. ...
 RA G. HOLCOMB
 Reporter

CUSTOMER'S DRAFT

Bank of America

NATIONAL TRUST & SAVINGS ASSOCIATION



JAN 13 1948 19

at sight

Pay to the order of

Grant Mfg Co

\$11,172.00

EXACTLY \$11,172 & 00 CTS

Dollars

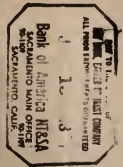
Value received and charge the same to account of
To Justin Rodde Lumber Co.
Shaw 1st National Bank.
Eugene, Oregon

Grant Mfg Co. Pay.
J. B. Craig

72-204 18-41

EXHIBIT
DEFENDANT'S
Case No. 43-50
G. HOLCOMB
Reporter

12315



Grant Mfg Co.
J. B. Craig

(Testimony of Stewart McLaughlin.)

Mr. Darling: You may cross-examine. [167]

Cross-Examination

By Mr. Prendergast:

Q. Now, Mr. McLaughlin, as a matter of fact, you heard from Lytle that he had placed this car of doors on the 11th of January, 1948, did you not, and you were invoiced for this car of doors by Grant Manufacturing on January the 12th, 1948, and they sight-drafted you on a 2-per cent sight draft on January 12th, 1948, and the First National Bank at Eugene paid the Grant Manufacturing Company \$11,172 on January the 15th, 1948, which made the car your car; isn't that a correct statement? A. Yes.

Q. Now, on January the 19th, 1948, four days after you bought the car, the People's Loan & Savings Bank accepted the sight draft of the Bank of California National Association which had been forwarded, so that that transaction followed the transaction in which your company, the Austin Dodds Lumber Company, bought the car. You bought the car and paid for it before you ever sold it to Barger, did you not, four days?

A. We did not.

Q. Well, you paid for it on the 15th of January. You did not deliver the bill of lading; it was an order bill of lading which means it cannot be opened or inspected or delivered until the bill of lading is delivered.

(Testimony of Stewart McLaughlin.)

A. We sold the car to Ruth Meyer. [168]

Q. You shipped it to Austin Dodds at Statesville, North Carolina on an order bill of lading.

A. Yes.

Q. Which was not to be delivered to Barger Millwork Company where it was destined until the bill of lading was delivered to the railroad. The bill of lading was left with your bank with the sight draft from the First National Bank at Eugene on the Bank of California at Portland and until that was paid the bill of lading was not delivered; isn't that a fact?

A. That is right.

Q. So that all the time that this car, from the 15th day of January, 1948, until that car arrived in Fayetteville, North Carolina, where it was diverted, sometime along near the end of the month, that car belonged to the Austin Dodds Company; it was in their name, it was destined to them; isn't that a fact? A. No.

Q. Whom did the car belong to?

A. The car belonged to Ruth Meyer.

Q. Ruth Meyer didn't get it until it was paid for and that wasn't paid for until after the 19th of January.

A. Then it was her car.

Q. When?

A. As soon as she paid for it.

Q. But she didn't pay for it. She didn't pay for it because [169] you knew it came from the Barger Millwork Company. You knew that Ruth

(Testimony of Stewart McLaughlin.)

Meyer was merely an agent, had been an agent broker, or whatever you call it, in the sale of cars before.

A. We had always considered Ruth Meyer as a wholesaler and our draft going into Portland was drawn on Ruth Meyer, the Bank of California, Portland, Oregon.

Q. And you were apprised of the fact that at that time, regardless of whom the car was sold to, you held the title to that car until at Fayetteville, North Carolina, the bill of lading was delivered to the railroad company; that was your instruction, wasn't it?

A. We held title to that car until Miss Meyer picked it up in the Bank of California; then it was her car, she held title to it.

Q. When did she pick that up?

A. Well, the bank at Eugene gave us credit for this sight draft on January the 19th.

Q. January 19th? A. At Eugene.

Q. Now, this car that you bought—Now, may I have that exhibit, Mr. DeMott, please, the one that is a letter of June the 25th. In this letter you informed the Barger Millwork Company that you had sold the car to the Barger Millwork Company through Ruth Meyer in Portland, Oregon. That is in all your letters, I think. In your letter of March 9th, 1948, "Quite [170] some time ago we shipped, through Ruth Meyer, a carload of doors"—and that was your attitude, you were dealing with them

(Testimony of Stewart McLaughlin.)

through Ruth Meyer; that is the expression in your letters.

A. That is the language in the letters.

Q. Now, you informed Barger at that time your profit was \$300, that you would refund that and the mill would give you \$300 and Ruth Meyer would give \$300.

A. Yes.

Q. That was your letter of June 25th. At that time you knew your profit was well in excess of \$1,000 on this car. You paid \$11,172 for this car and you sold the 1500 doors for \$8.15, or \$12,225, so when you told Barger you only made \$300 on that car you misstated it, didn't you?

A. I didn't say that was all our profit.

Q. You said you will allow our profit of \$300.

A. I said we will allow you our commission.

Q. But, actually, you had a profit of over \$1,000, didn't you?

A. We did.

Q. So that when you said "Commission" to him you didn't mean anything; you were misstating it, were you not?

A. I was not.

Q. What?

A. I was not.

Q. Well, did you have a commission or a profit?

A. We had a profit. [171]

Q. So when you said "We will allow you our commission of \$300" what did you mean?

A. We quite often use the word "commission," meaning profit.

Q. But your profit wasn't \$300?

A. No.

Q. It was a thousand and some dollars?

(Testimony of Stewart McLaughlin.)

A. Right.

Mr. Prendergast: May I have the letter of May the 17th.

Q. Now, these order bill of ladings, let me ask you about that. There is no right of inspection until after the bill of lading is delivered. When the bill of lading is delivered then the car is turned over to the person delivering the bill of lading, so there is no right of inspection until that time, and the bill of lading is not delivered until the car is paid for, so that is the difference between them.

A. And also until the railroad gets their freight.

Q. And also until the railroad gets the freight.

A. That is right.

Q. So, in other words, a man buys a "pig in a poke" on an order bill of lading; he has no right of inspection before that?

A. There is no right of inspection on any bill of lading.

Q. It is if it is put on there, prior right of inspection. Now, this letter of May 17, 1948, which is marked Plaintiff's Exhibit 5 and introduced by the defendant here, is your synopsis of actually what transpired, is it not, and you wrote it, signed "Mac, S. P. McLaughlin," to "Bill," a representative of your company?

A. Bill Robb, yes.

Q. And in this letter you say, "We will attempt to give you a synopsis of what has gone on regarding the car of doors that we shipped out of the Grant Manufacturing Company to the Barger Mill-

work Company at Statesville at North Carolina and on which a complaint has been filed.”

Now, you shipped it out of the Grant Company according to the letter to Barger. “There is no doubt as to the customer’s right on this complaint as the stock was not what it was supposed to be. In order that you can more or less review the situation we have enclosed a copy of our order to the Grant Manufacturing Company, their original invoice and on this please note that they have marked 2 per cent B doors and a copy of our invoice to the customer as well as a copy of the order we took from Ruth Meyer.”

Now, let me interrupt the reading to ask you—and I am referring now to Defendants’ Exhibit Q, which is the invoice from the Grant Manufacturing Company—when you bought these doors from the Grant Manufacturnig Company you did not buy F-82 doors and it was not so designated any place, was it? You bought Grade B doors from the Grant Manufacturing Company and you were invoiced and paid for Grade B doors, and there is nothing about F-82 doors on there?

A. That is 2 per cent B doors. [173]

Mr. Prendergast: You might hand this to the witness.

Q. Examine that closely and tell me if there is anything on there to indicate you bought F-82 doors from the Grant Manufacturing Company?

A. They are not marked F-82 doors.

Q. So, when you bought that, paid for it, from the Grant Manufacturing Company and sold to

Barger you knew you were selling Barger something that you had not bought from the Grant Manufacturing Company, nor had you paid the Grant Manufacturing Company for F-82 doors? You bought some Grade B doors and paid for them and sold them as F-82 Grade A doors to Barger; is that not a fact. A. We did not.

Q. That is your invoice of what you bought from Grant?

A. That is right; I agree.

Q. And here is your invoice of what you sold to be shipped to Barger, and this is Plaintiff's Exhibit 2. Now, if you will notice your invoice you bought Grade B doors, not F-82, and you sold, or represented to have sold Grade A doors with not more than 2 per cent B F-82 doors. Those are the same doors, aren't they; it is the same car?

A. Grant Manufacturing Company's invoice says 2 per cent B doors.

Q. It doesn't say anything about F-82?

A. It would be a F-82. [174]

Q. There are lots of two-panel doors that are not F-82? A. That is true.

Q. Now, it goes on and says: "The doors were represented to Lytle as F-82 doors and that they would not run over 2 per cent B grade. In the first place, they were not F-82 doors. They were instead a two-panel door but not a stock item. From what information we have been able to gather they had very, very narrow stiles and rails. In other words, they were not a standard pattern F-82 door. In the

(Testimony of Stewart McLaughlin.)

second place, the customer stated that 60 to 70 per cent of the doors might by wide stretch of imagination grade out B grade and there were a considerable number of doors that would grade C and D. He said that on close inspection one might find a few A doors. In regards to the manufacture he further stated that the lock rail was centered on the panel and the rail was only four inches wide instead of the approximately eight inches on the standard door. We talked to him on the phone and he told us that he just didn't know where he would sell them unless he could get some contractor to take these doors and put them in a bunch of houses. In other words, being as they are not stock items they cannot be used as replacements, nor can they be sold very readily to the ordinary trade. The millwork company has been exceedingly nice about this lousy shipment and I have tried from here, both by wire and by phone, to get some settlement from the Grant Manufacturing Company. My efforts have resulted in nothing. I even tried to [175] scare them into''——

The Court: Why are you reading that? He remembers he wrote the letter.

Q. (By Mr. Prendergast): Now, you did make a settlement with the Grant Manufacturing Company, is that right? A. We got \$315.

Q. And what did you sign in exchange for the \$315; what sort of a settlement did you make?

A. I didn't personally pick up the check.

(Testimony of Stewart McLaughlin.)

Q. Are you familiar with what your corporation did? It was the Interstate Lumber Sales that made the settlement.

A. It was the Interstate Lumber Sales that made the settlement.

Q. And the check was made to Interstate Lumber Sales? A. It was.

Q. And what sort of a settlement did you make with the Grant Company?

A. Mr. Robb reported back what I had outlined in one of my letters, that that is all he could get out of them, and on advice——

Q. Please answer my question. What sort of a document did you get? A. We got a check.

Q. And what did you give them in exchange for the check? A. As far as I know, nothing.

Q. You mean they just gave you a check? [176]

A. That is right.

Q. Nothing else; after you had had all the trouble with these people, they just took a check and no receipt from you or anything to show full settlement of any claim?

A. None was ever mentioned.

Q. Did you consider for that \$315 the Interstate Lumber Sales had been fully settled for any claim and had fully settled any claim against the Grant Company?

A. Mr. Robb told them, as he reported back to me, that he would take the check subject to the final approval of the whole settlement.

Q. Of whom?

(Testimony of Stewart McLaughlin.)

A. Of the whole settlement, to get the whole settlement worked out on that basis, that would be okeh.

Q. And you put that check in the bank right away? A. I did.

Q. And in June you wrote to Barger and you told him you were going to give him your commission of \$300 and the mill was going to give him \$300 and Ruth Meyer was going to give him \$300 in settlement of his \$12,000 claim and that that would cover his freight and that was about all, isn't that about right? A. Yes.

Q. When you talked to Barger on the telephone on the 4th of February and he complained, as you say, very bitterly about the grade and the standard of these doors, you did not discuss any [177] price at all at that time; that is your testimony?

A. We did not.

Q. And that was the only time that you talked to Barger, except possibly in the fall when he came out here? Did you talk to him in the fall?

A. I might have greeted him; that is all.

Q. But you didn't discuss anything?

A. No.

Mr. Prendergast: That is all.

Redirect Examination

By Mr. Darling:

Q. This, as I recall the letter of June 25th, did you say anything in that about foregoing all your commission? I just want to make it clear. I think there was some prior letter in which you said—

(Testimony of Stewart McLaughlin.)

March 9th—in which you said you were willing to forego your commission, but I don't believe in your June 25th letter that you told them that the \$300 was your commission. I think it was prior to that, just so the record is straight and the Court will see all the letters.

The Court: Yes. Step down. You have one more witness, I suppose, Mr. Darling. I suppose you are going to call Mr. Whitehouse.

(Witness excused.) [178]

Mr. Darling: Unless he is another expert.

The Court: Yes. You have had three experts. How long a witness will Mr. Whitehouse be?

Mr. Darling: Probably ten minutes.

The Court: Supposing you put him on.

Mr. Darling: Call Mr. J. L. Whitehouse.

J. L. WHITEHOUSE

was thereupon produced as a witness in behalf of Defendants and, being first duly sworn, was examined and testified as follows:

The Court: Now, in making your own plans, you will want to argue the case. You can come back at 9:00 o'clock in the morning to do that. If you want to go to Eugene, I will stay.

Mr. Prendergast: Your Honor, the only thing is that I have the case that follows this and that will start at 10:00.

The Court: I said we will do it tonight or come back in the morning.

(Testimony of J. L. Whitehouse.)

Mr. Prendergast: I am perfectly willing to accommodate Counsel.

Mr. Darling: Of course, we would prefer to do it tonight if it is not too much of a hardship.

The Court: All right. Proceed.

Direct Examination

By Mr. Darling:

Q. Now, Mr. J. L. Whitehouse, will you tell us what your [179] present occupation is?

A. Lumber wholesale.

Q. Were you engaged as an individual in the lumber wholesale business in January, 1948?

A. I was.

Q. And you are the Mr. Whitehouse that has been mentioned here a number of times as doing business as Interstate Lumber Sales?

A. I am.

Q. And what is your present position in the corporation of Interstate Lumber Sales, Inc.?

A. President.

Q. And you have associated with you in that corporation Mr. McLaughlin that just testified, and Mr. Lytle?

A. I have.

Q. Now, in January of 1948 Mr. McLaughlin was working for you, as I understand it?

A. That is correct.

Q. All right; now, when did you first hear, if you can recall, concerning the complaint on this carload of doors?

(Testimony of J. L. Whitehouse.)

A. It would have been sometime the latter part of February, possibly the first part of March.

Q. What was the nature of the information that you received?

A. The information I received was that we had a car of doors in North Carolina upon which we had a claim filed.

Q. Did you know to whom those doors had been sold? [180]

A. I didn't at the time. I inquired, naturally, and learned they had been sold to Ruth Meyer.

Q. Had you had prior dealings with Ruth Meyer? A. We had.

Q. Did you know what position Ruth Meyer occupied in the trade?

A. As a—she was listed as a wholesaler.

The Court: What do you mean "listed"?

A. In the Lumberman's Red Book, sir.

The Court: That is a credit book?

A. That is a credit book.

Q. (By Mr. Darling): Did you deal with her on that basis? A. We did.

Q. Did you in January of 1948 know the Barger Millwork Company? A. I did not.

Q. Or the plaintiff in this case?

A. I did not.

Q. Did you know anything concerning the nature of their business? A. I did not.

Q. Now, did you know about this letter of June 25, 1948, which was written by Mr. McLaughlin to Barger, the plaintiff here in this case?

(Testimony of J. L. Whitehouse.)

A. That is the one where the check was mailed?

Q. Yes. [181] A. Yes, I did.

Q. Well, did they explain to you the basis upon which that letter was being written? Did you know the basis?

A. I knew that it was being——

Mr. Prendergast: Now, if the Court please, I object. He asked the question “Did they explain to you the basis upon which it was written,” and he is answering. Now, that is——

Mr. Darling: I will withdraw the question.

Q. Was this letter written with your authority and at your request?

A. I would answer that by saying that I have at all times instructed and expected Mr. McLaughlin to make the sales, to follow up on any collections that might be made or necessary, and as such expected him and instructed him to act in my behalf.

Q. Was he so acting at that time?

A. That he was doing.

Q. When he wrote that letter?

A. That is right.

The Court: What was your volume for any twelve-months period in about this time, '48; how big an outfit were you?

A. I'd like to refer that question to Mr. McLaughlin if I might. He is the one familiar with that.

The Court: Can't you give me an approximate figure? How much of it was doors?

(Testimony of J. L. Whitehouse.)

Mr. McLaughlin: How many cars were shipped?

The Court: 1948, 1947.

Mr. McLaughlin: It would have been about \$1,-200,000.

The Court: And how much door business did you do?

Mr. McLaughlin. Oh, by cars, a small percentage.

The Court: Well, a hundred cars?

Mr. McLaughlin: No, no. Probably a dozen.

Mr. Darling: 1947 was Austin Dodds.

Mr. McLaughlin: Austin Dodds.

The Court: All right.

Q. (By Mr. Darling): Well, now, did you hear anything further or anything from Barger or the plaintiff in this case after that letter was sent in June of 1948?

A. Not until September when the check was returned.

Q. When was the first time that you—I will put it this way: Did you ever receive any information to the effect that the plaintiff in this case had rescinded his order for the doors?

Mr. Prendergast: If the Court please, I object to that as being leading.

The Court: You may answer.

A. I did not until Mr. Barger called in my office personally.

Q. (By Mr. Darling): Was there a letter—what about the letter with the check; did you get any indication from the letter with the check that he considered the doors yours?

(Testimony of J. L. Whitehouse.)

A. I did not.

Q. I will hand you Defendants' Exhibit B for the purpose of [183] refreshing your memory, if required.

A. All right. This was the letter that I answered, I believe.

Q. What?

A. This is the letter that I answered and returned the check.

Q. Did you consider that letter as any notice by Barger, the plaintiff in this case,—

Mr. Prendergast: If the Court please, I object to this question as calling for a conclusion. The letter speaks for itself.

The Court: He may answer.

A. This letter arriving—in other words, our check having been mailed in June, this letter having been received in September, our check having been held by the Berger Millwork Company for that length of time constituted, as far as I was concerned, settlement of the claim.

Q. (By Mr. Darling): Now, then, following the receipt of that check did you write another letter to him, to Barger Millwork, the plaintiff in this case?

A. Following the receipt of the check in this letter?

Q. Yes.

A. No, just the one, this September 23rd, that

(Testimony of J. L. Whitehouse.)

was the answer to this one in which I sent the check back.

Q. And when you sent back that check what was your understanding about what you were doing?

A. That the matter was settled as far as we were concerned, the [184] claim was settled.

Q. Now, Mr. Barger came out here sometime in October he states. Do you recall having met with him at the time?

A. Yes, I met with Mr. Barger and Miss Meyer both in my office.

Q. Did Mr. Barger state anything to you concerning any activities that he had had following receipt of your letter of June 25, 1948, with respect to selling or attempting to sell these doors?

A. He did. He stated that he had tried to sell the doors, that he had gone so far as to hire a man outside of his employ who rented space in an adjoining town and that the doors had been trucked from his warehouse to the adjoining town, that a sale had been proposed and put on and that the doors, there had been an attempt to dispose of the doors in that way.

Q. Did he at that time give you any indication as to whether or not he was conducting the sale for himself or for you?

A. For himself.

Q. Now, was Ruth Meyer present at any time when these conferences with Mr. Barger—

A. She was present at that time.

(Testimony of J. L. Whitehouse.)

Q. Did you say anything to her at all concerning the payment of \$300 to Barger, as indicated by the letter of June 25, 1948?

A. I did. I asked Ruth Meyer if she had sent her \$300 to Mr. Barger. She nodded her head and Mr. Barger made no comment.

Q. Was Barger in position to see her nod her head? [185] A. He was.

Q. Hear you address the question?

A. He was.

Q. This picture that has been in evidence, you have seen it? A. I have.

Q. Plaintiff's Exhibit 9. Did Mr. Barger tell you anything concerning the taking of that picture?

A. Only that he had picked out one of the worst doors in the lot to show the defects, the typical defects of the doors.

Q. You have heard testimony here concerning this 40 cents a door offer. Was that ever brought to your knowledge?

A. No, I don't believe it was. It wasn't. That was—I knew the boys were working on a settlement and I wouldn't testify as to that.

Q. At any time during your relationship with Ruth Meyer in this case did you ever authorize her to ask and suggest to Barger that those doors be sold for your account? A. We did not.

Q. Did you ever authorize the sale of the doors on your account? A. We did not.

Q. Did you ever consider—whose doors did you consider these to be?

(Testimony of J. L. Whitehouse.)

Mr. Prendergast: If the Court please, I object to that.

The Court: He may answer.

A. We considered the doors to be the doors of Barger Millwork, [186] and the only demand on us was a settlement or adjustment in price.

Mr. Darling: That is all. You may cross-examine.

Cross-Examination

By Mr. Prendergast:

Q. Are you familiar with what Mr. McLaughlin was doing in trying to settle this door claim?

A. I checked with Mr. McLaughlin from time to time.

Q. Are you familiar with his letter of May 17, 1948, and in particular with this sentence, "In attempting to make a settlement on these I asked for a dollar-per-door rebate and figured that we could probably get back a quarter from Ruth Meyer per door which would at least pay the poor guy his freight and give him about four-bits a door to lop off the price"?

A. It is not uncommon for a wholesaler who has sold through another in event of claim from matching commission or amounts in order to settle a claim.

Q. You knew that these doors were not salable by anyone? A. I did not.

Q. You were familiar with Mr. McLaughlin's statement that they were not; in other words, "These

(Testimony of J. L. Whitehouse.)

are not stock items and cannot be used as replacement, nor can they be sold readily to the ordinary trade." You knew that, didn't you?

A. I know at the time those doors were sold that doors were scarce. To whom is the letter addressed there, may I ask? [187]

Q. "Bill," Interstate Lumber Sales, Yreka, California. That is Bill Dodds, is it not?

A. No, it is not. That is Bill Robb. That is right.

Q. Robb. Now, in regard to the Interstate Lumber Sales, the Interstate Lumber Sales was what on January 15th of 1948; who was the Interstate Lumber Sales? A. J. L. Whitehouse.

Q. That was yourself. And when you stamped your stationery "Austin-Dodds Lumber Company," which you were using on up into June of 1948, you put "Interstate Lumber Sales, Successor to Austin Dodds Lumber Company." What did you mean by "Successor to Austin Dodds Lumber Company"? Did they assume the obligations of the Austin Dodds Lumber Company?

A. I meant the Interstate Lumber Sales had taken over all the assets of the Austin Dodds Lumber Company, that the personnel was exactly the same, that the only change, the only difference was that Austin Dodds had retired from the business.

Q. So the only change was Austin Dodds went out of the business and you continued to use that

(Testimony of J. L. Whitehouse.)

stationery until September of 1948—No, I beg your pardon—Withdraw that. Now, what was the relationship between the Interstate Lumber Sales and the Interstate Lumber Sales, Inc.?

A. The Interstate Lumber Sales, Inc.—on April 1st, 1948, a corporation was formed in which Mr. Lytle, Mr. McLaughlin, Mr. Robb and myself took over the assets of the Interstate [188] Lumber Sales as an individual.

Q. I see. In other words, the entire business of the Interstate Lumber Sales was taken over by the Interstate Lumber Sales, Inc., is that right?

A. With the exception of certain accounts which I as an individual guaranteed for the corporation, and that was——

Q. Did you guarantee this claim of Barger as an individual to the Interstate Lumber Sales, Inc.; did you guarantee that claim? A. I did.

Q. And so that when the check of June the 25th, which is Defendants' Exhibit I, was signed by S. P. McLaughlin on the Interstate Lumber Sales, Inc., account, that was because of the fact that Interstate Lumber Company account had assumed on your account the obligations of the Interstate Lumber Sales?

A. That is not correct. The Interstate Lumber Sales, that is Mr. McLaughlin acting for me, continued to handle the account as before. However, I carry an open account; there is an open account with Interstate Lumber Sales, Inc., and J. L. White-

(Testimony of J. L. Whitehouse.)

house as an individual upon which accounts are adjusted.

Q. But this is the check of Interstate Sales, Inc.

A. That is not my personal account, however. There is a personal account that is adjusted between myself and the corporation to take care of losses on accounts that I guaranteed.

Q. But this check wasn't written on that account? A. No. [189]

Q. This is the regular corporation account?

A. That is written on the corporation account, that is true.

Q. And, as a matter of fact, your letter of September 23rd, 1948, is written on the Interstate Lumber Sales, Inc., and signed Interstate Lumber Sales, Inc., by J. L. Whitehouse.

A. That is done as a matter of——

Q. And that refers to this same claim of Barger.

A. That refers to the same claim and was done as a matter of routine.

Q. Because of the fact they had assumed——

A. No. Because of the fact that we have, we had the stationery and that is the way the letters were always typed up.

Q. Well, now, you say that you first heard about this transaction sometime after it happened, is that right? A. That is correct.

Q. And you didn't know anything about buying from Grant Manufacturing Company on the 15th and selling through Ruth Meyer on the 19th?

(Testimony of J. L. Whitehouse.)

A. That is correct.

Q. You had no knowledge of that at all?

A. That is correct.

Q. And you didn't hear about it until you heard there was a claim. Now, when did you guarantee the claim of Barger against the Interstate Lumber Sales to the Interstate Lumber Sales, Inc.?

A. That was at the time of the incorporation.

Q. That was in April? A. April.

Q. You guaranteed to pay that claim, is that right, personally? A. Yes.

Q. Let me ask you this: In September, on September the 23rd, 1948, you received your check back that was written in June, this check written on the corporation, you received that back from Barger; and on September the 23rd you mailed the check back to Barger, that same check which was written in June, and in this letter you told him that that is all you were going to do about it, and you testified you considered the matter closed by reason of the fact he had retained the uncashed, uncertified check from sometime around the 1st of July until the 13th of September; is that your testimony?

A. That is right.

Q. In other words, you felt that Barger had accepted \$615 for a \$12,000 investment in February?

A. Let me put it another way. Barger had over two months in which to let us know that the settlement was not sufficient if he wasn't satisfied.

Q. Did you do anything about this check? You had it out for two months, a corporation check.

(Testimony of J. L. Whitehouse.)

A. We had it out—he had it out two months.

Q. You had the check out; it didn't come back to you. Did you call him up or ask him if it was satisfactory or write to him? [191]

A. We received the check there in September, the 13th it was, and it was mailed back on the 23rd.

Q. That is right, and in the meantime he was trying to sell your doors. Did you check with him at all on it? A. No.

Q. You knew that he was out some \$12,000, \$12,-220 to you and \$12,600 with the commissions, that that had been paid in February, that you sent him a check in June that arrived about the first of July, June 25th, and so he had the check during the month of July and the month of August and he sent it back to you and you expected him, knowing, too, that your agents had said that he would get \$915; you wrote back to him and told him that \$615 was all he was going to get and you figured that was the settlement?

A. He had the doors, he had the merchandise; he had them since January, and——

Q. And you knew they were worthless, too, didn't you? A. I did not.

Mr. Prendergast: That is all.

Mr. Darling: One question he just brought out.

Redirect Examination

By Mr. Darling:

Q. He said you knew they were worthless. Would these doors have been salable in January of 1948,

(Testimony of J. L. Whitehouse.)

even assuming they were of the description given to them by the plaintiff in this case? [192]

A. They would have been.

Q. Would they have been salable in February of '48? A. They would have been.

Q. And would they have been salable in March of '48?

A. In March the market began to slip. I am not too sure.

Q. How about the summer of '48 from June to September?

A. Again the market was worse.

The Court: That is all. Rebuttal.

Mr. Prendergast: One second. May I check.

(Witness excused.)

Mr. Prendergast: Yes. Cecil Barger, please.

Plaintiff's Rebuttal Testimony

CECIL BARGER

was thereupon recalled as a witness, in rebuttal, in behalf of Plaintiff and, having been previously duly sworn, was examined and testified further as follows:

Direct Examination

By Mr. Prendergast:

Q. Mr. Barger, you have heard the testimony of Mr. McLaughlin of the telephone records, that they indicate he telephoned you on February the 4th. Is that substantially correct now that you have had your memory refreshed?

(Testimony of Cecil Barger.)

A. It could easily be.

Q. And at that time you had received some of the doors back and told him of the defects?

A. Yes, I received the first shipment back on the 2nd.

Q. As you testified before? A. Yes.

Q. Now, you heard the testimony of Mr. Whitehouse that in October when you came out here that you told him that you had for your own purposes set up another sales organization in some other city and hired a man and a hall to try to sell these doors. Is that true?

A. The doors had been, we had made an effort to sell the doors, but not for our purpose. We had no interest from the beginning in trying to sell them for our purpose. They were not our doors. Why would we be interested in fooling with them in the first place? [194]

Q. What did you do? Did you set up another sales organization and hire somebody?

A. We had our salesmen who are out more or less constantly making a special effort in his behalf in view of this settlement, so to speak, that he had finally gotten out of this mill which he claims to have done, making a special effort in his behalf to move the doors allowing just the concession that was indicated per door, or more.

Q. Were you able to sell them? A. No.

Q. Was there any market for them at all?

A. Not through our organization, because we have no contact.

(Testimony of Cecil Barger.)

Q. You also heard the testimony of Mr. Whitehouse in your presence and in your sight that when he asked Ruth Meyer if they paid you \$300 that she nodded her head.

A. I heard him say that?

Q. Is that true?

A. I didn't see her nod her head. I don't even recall the question being asked. I don't know it wasn't, but I don't recall it.

Q. Did she ever pay you or offer to pay you \$300? A. No.

Q. After receiving, along about the first of July, receiving the check of Interstate Lumber Sales, Inc., for \$615, did you consider at any time seriously or otherwise accepting \$615 for [195] your \$12,000 claim?

A. Why, no. It was ridiculous, and I told Ruth on the phone within a day or two after receiving it that it was utterly out of the question, that the settlement wouldn't begin to move the doors. When the thing first happened, back in January, in view of the type—and by this July when the settlement was finally tendered, by the end of June, as Mr. Whitehouse brought out, the market had slipped by the time they finally indicated what their settlement was—three times that wouldn't have begun to interest anyone.

Mr. Prendergast: That is all.

Mr. Darling: That is all.

The Court: That is all.

(Witness excused.)

The Court: Further rebuttal? I will tell you what you gentlemen better do. You better come down another day and talk all morning or all day. You don't have to rush yourselves in a half-hour. That is not a very good way to present a case. Don't you think you better do it that way? Maybe you don't think there is much to talk about.

Mr. Darling: I think there is a lot to talk about, and I think Counsel will agree that the questions of law are almost multitudinous. We would be willing if the Court felt it would be more appropriate to file a written argument on the matter, [196] because I know personally, and I think they know, too, that the amount of enthusiasm or emotional appeal we put in our argument is not going to do any good. It is what we say that will mean something and we feel that——

The Court: It is up to you. Maybe you would like to argue and brief them both.

Mr. Prendergast: Well, your Honor, because of this situation—we do know your docket is in bad shape and they have everything piled on right now——

The Court: I will tell you what you do. You gentlemen come here at 9:00 o'clock in the morning. I don't want to hear a sketchy argument. If you are going to argue, you will want to talk at least an hour on the side. So, you come at 9:00 o'clock in the morning and I will give you an hour on the side.

Mr. Prendergast: May I ask your Honor if we will start the other case at 10:00 or——

The Court: We will start that at 11:00. [197]

May 6, 1949.

Mr. Darling: I move at this time, your Honor, that the case be reopened. I would like to have it reopened for the purpose of placing in evidence two additional exhibits which I think will clarify one or two points.

The Court: Have you seen them?

Mr. Prendergast: Yes, I have seen them, and I have no objection to them going in.

The Court: Admitted.

Mr. Darling: I would like to have them marked. I believe they will be S and T.

(Letter from Ruth Meyer to F. A. Lytle, dated January 10, 1948, so produced, was thereupon received in evidence as Defendants' Exhibit S; and

(Invoice of Austin Dodds Lbr. Co. dated January 15, 1948, so produced, was thereupon received in evidence as Defendants' Exhibit T.)

DEFENDANT'S EXHIBIT S

[Letterhead]

Ruth Meyer

January 10, 1948

Mr. F. A. Lytle
9335 N. Van Houten Avenue
Portland 3, Oregon

Dear Al

This morning you offered me over the telephone

a carload of F82 fir doors in the following assortment:

1000	2.8x6.8	
400	2.0x6.8	
100	2.6x6.8	@\$8.15

Shortly I telephoned Mrs. Lytle and confirmed purchase of this car for shipment to

Barger Millwork Co.

Statesville, N. C.

route if possible GN-CB&Q—Southern Del.

I didn't know whether these doors would be Robinson doors again from Everett, but in any case I am assuming they are standard, up to grade doors. I assured my customer who was very pleased with the last two cars that we could have every confidence in the agent.

Many thanks, Al, and as soon as you tell me where to ship the formal purchase order, I shall send that out.

Sincerely,

/s/ RUTH.

RUTH MEYER.

F. A. LYTLE.

DEFENDANTS' EXHIBIT T

[Letterhead]

Austin Dodds Lumber Company

Date January 15, 1948

Page No. 1

Invoice No. 18

Our Order No. 2358

Price f.o.b. car Del Paso Heights, California

Car No. ATSF-149509

Sold to Ruth Meyer, Davis Building, Portland 4,
Oregon

Shipped to Grand Mfg. Co., Statesville, N. C.

Route SN, WP, DRG, CB&Q Southern Dely.

Terms Net 5 days after arrival.

West Coast Terms and Conditions of Sale to
Govern All Transactions. No Claim Considered Un-
less Made Within 5 Days After Arrival of Car.

Douglas Fir Doors

1,006—2-8 x 6-8 Two Panel Doors.....	8.15	\$8198.90
400—2-0 x 6-8 Two Panel Doors.....	8.15	3260.00
93—2-6 x 6-8 Two Panel Doors.....	8.15	757.95
1—2-6 x 6-8 One Panel Door.....	8.15	8.15
		<hr/>
		\$12,225.00

Invoice in duplicate. B/L attached.

cc: First National Bank of Eugene, Oregon.

F. A. Lytle

[Title of District Court and Cause.]

REPORTER'S CERTIFICATE

I, Glenn G. Foster, hereby certify that on Thursday, May 5, 1949, I reported in shorthand certain proceedings had in the trial of the above-entitled cause; that I subsequently caused my said shorthand notes to be reduced to typewriting, and that the foregoing transcript, consisting of 197 pages, numbered 1 to 197, both inclusive, constitutes a full, true and accurate transcript of said proceedings, so taken by me in shorthand on said date, as aforesaid, and of the whole thereof.

Dated this 11th day of July, A.D. 1949.

/s/ GLENN G. FOSTER,

Court Reporter Pro Tem.

PLAINTIFF'S EXHIBIT No. 1

[Letterhead]

Austin Dodds Lumber Co.

March 9, 1948

Via Air Mail

Barger Millwork Company
Statesville, North Carolina

Gentlemen:

Quite some time ago we shipped, thru Ruth Meyer, a car load of doors that were evidently not only not up to grade specifications, but were apparently a peculiar type of 2 panel door. You were not satis-

fied with the shipment, and we of course called you direct on it in an effort to ascertain what the reasons were for the claim.

You have probably thought that we have entirely forgotten the matter, but we are dropping you this note to assure you that we are doing all possible to work out a reasonable settlement on the shipment. We are having considerable trouble with the manufacturer in getting him to acknowledge the claim, and in spite of our numerous phone calls to him we have not yet been able to arrive at a basis of settlement. They promised to call us the next day, but this has been going on now for a couple of weeks and we are writing them today in an effort to work out a settlement without allowing this matter to drag on any further. We may or may not get some action on it, but our buyer is now down at Yreka, California, and unless the door factory acknowledges the claim and does so promptly, we will have our buyer go on over to Sacramento and attempt to have the matter settled.

We are quite willing to forgo our commission on these doors in an effort to compensate you somewhat for the car, but we feel that our commission is so small that it would be but a token offering in so far as a settlement was concerned, and for that reason we have been doing our very best to get a settlement from the mill somewhere in the neighborhood of a more satisfactory refund to you than our commission would permit.

Be assured again that we have not forgotten this

claim, nor are we attempting to let it drag out to a point where it would be forgotten. We are reliable shippers, and in the event that we do get a lemon such as this car no doubt is, we always try to do all possible to affect a settlement satisfactory to the customer. We will certainly advise you as soon as we have a definite answer here.

Thanks very much for being very patient with us, and we will certainly want to do the right thing by you.

Yours very truly,
AUSTIN DODDS LUMBER
COMPANY,
/s/ S. P. McLAUGHLIN.

nw

cc: Ruth Meyer

PLAINTIFF'S EXHIBIT No. 4

[Letterhead]

Interstate Lumber Sales—Successor to
Austin Dodds Lumber Co.

June 25, 1948

Check #312

Date: June 25, 1948.

Amount: 615.00.

Signed: S. P. McLaughlin, Interstate Lbr. Sales.
Barger Millwork Company
Statesville, North Carolina

Gentlemen:

We refer to car AT&SF-149509 shipped to you

on January 15th, that contained 1500 Fir doors. This car was covered by our invoice #18 and our order #2358. The car was sold to you thru Ruth Meyer at Portland, Oregon.

You filed a claim on this car of doors stating that they were not of first class manufacture, they were not of the standard pattern, and that the grades on those doors were very much off the represented grade. In our exchange of correspondence we told you that we would endeavor to work out a settlement of some kind and that we would continue to work on this claim until we reached the best settlement we could make on this end.

It has taken considerable time and has been expensive, and the results have not been too satisfactory, but under the circumstances it is the best we have collectively been able to do. We sent our representative into Sacramento in an effort to bring about a settlement of this car. The Grant Manufacturing Company made the doors, gave us the run around every time we attempted to settle the account over the phone and by letters we finally decided that we would have the representative of the Company go down to Sacramento and attempt to personally work out the settlement. It took him 2 or 3 days to get this matter brought to a conclusion and settlement that he got from the Manufacturing Company was taken on the advise of the attorneys at Sacramento. The Company is strictly a small time operation and very, very shaky financially. Management is not good, and the attorney who car-

ried on the work for us at Sacramento told us that it was just a matter of days as to how long the plant would continue in operation. Our representative there looked over the situation very carefully and was very much inclined to agree with the opinion of the attorney and took a check for \$315.00 as a settlement on this shipment. I believe this figure was arrived at on a basis of 30c a door on 70% of the doors but regardless of the basis of settlement it was all the money that he could get out of the Company and after seeing the plant first handed and looking over the situation was inclined to believe that we were fortunate in getting that much out of them. They stalled our representative until after the Bank closed and then gave him a check. He could not wait over to ascertain whether or not the check was good and as he felt the whole situation was very, very shaky we deposited the check about 2 weeks ago and asked that the paying Bank notify us whether the check was good or not good. Evidently this request went astray as we have not heard of the fate of the check but have assumed that sufficient time has elapsed to have allowed the check to have been returned to us in the event that it was no good.

We feel responsible for this shipment and realize that you have a tough problem on your hands in trying to dispose of this stock. We have always stood behind our shipments and have always endeavored that in the event of a claim on any of our cars, have always tried to work out settlement with

the customer that is both fair and reasonable. Ruth Meyer who handled this order for you in Portland is of the same opinion and she too has agreed to put up \$300.00 as her contribution in making up a settlement to you. The settlement that we got direct from the Manufacturing Company, was the refund by Ruth Meyers, plus our \$300.00 will make you a refund of \$915.00 on this particular shipment. This amount will pay the freight on the car and give you some rebate on the doors.

We have enclosed our check for \$615.00 and Ruth Meyers will forward you her own check for her share of this adjustment.

We very, very much appreciate the cooperation you have given us and we appreciate the fact that you realize that such cases as this where the mill is not reliable it is most difficult to work out any kind of a settlement.

We trust that this settlement meets with your approval and that you will permit us to again quote on some of your requirements. We may be able to overcome any additional loss you might have on these doors by getting you some stock from time to time at our cost.

Yours very truly,

INTERSTATE LUMBER
SALES, INC.,

/s/ S. P. McLAUGHLIN.

SPM:caw

cc: F. A. Lytle

Ruth Meyers

PLAINTIFF'S EXHIBIT No. 5

[Letterhead]

Interstate Lumber Sales—Successor to
Austin Dodds Lumber Co.

May 17, 1948

Interstate Lumber Sales

Yreka Inn

Yreka, California

Dear Bill:

We will attempt to give you synopsis of what has gone on regarding that car of doors that we shipped out of the Grant Manufacturing Company to the Barger Millwork Company at Statesville at North Carolina and on which a complaint has been filed.

There is no doubt as to the customers right on this complaint as the stock was not what it was supposed to be.

In order that you can more or less review the situation we have enclosed a copy of our order to the Grant Manufacturing Company, their original invoice and on this please note they have marked 2% B doors and a copy of our invoice to the customer as well as a copy of the order we took from Ruth Meyer.

The doors were represented to Lytle as F82 Fir Doors and that they would not run over 2% B grade. In the first place they were not F82 doors. They were instead a 2 panel door but not a stock item. From what information we have been able to gather they had very, very narrow styles and rails. In

other words they were not a standard pattern F82 door. In the second place the customer stated that 60 to 70% of the doors might by wide stretch of imagination grade out B grade and there were a considerable number of doors that would grade C and D. He said that on close inspection one might find a few A doors. In regards to the manufacture he further stated that the lock rail was centered on the panel and the rail was only 4" wide instead of the approximately 8" of the standard door. We talked to him on the phone and he told us that he just didn't know where he would sell them unless he could get some contractor to take these doors and put them in a bunch of houses. In other words being as they are not stock items they cannot be used as replacements nor can they be sold very readily to the ordinary trade. The millwork company has been exceedingly nice about this lousy shipment and I have tried from here, both by wire and by phone, to get some settlement from the Grant Manufacturing Company. My efforts have resulted in nothing. I even tried to scare them into making a settlement but I got no where.

In attempting to make a settlement on these I asked for a dollar per door rebate and figured that we could probably get back a quarter from Ruth Meyer per door which would at least pay the guy his freight on his load of junk and give him about four bits a door to lop off the price. I talked to Don Moore at the Grant Manufacturing Company who was supposed to have taken the matter up with the board of directors or whatever characters run

the place and call me back. He didn't. After a reasonable length of time I dropped him a wire that went unanswered and a little later called and talked to Mr. Craig. He gave me the same "stall" and the net result is we have gotten no where. If you want anymore dope on this you might check with me on the phone before you go down there and if you are bigger than Moore, which I think you are, and Grant isn't too big you might scare them into coming clean. Incidentally any settlement we make will be to some advantage. The enclosed papers are for your information and in as much as they practically wipe out the file on this particular order, please take good care of them and return them when you're done with it. Please don't go over to Sacramento without having this whole deal pretty well in mind as I think we're only going to get one strick at them and we're done. You can kind of mull these papers over and whatever other information you get you can call and then when you go down there you'll have the whole situation in a nut shell. My own personal opinion on this is an open case of fraud on the grades alone not considering that the doors were not stock F82.

Yours very truly,

INTERSTATE LUMBER
SALES,

/s/ MAC,

S. P. McLAUGHLIN.

SPM:caw

PLAINTIFF'S EXHIBIT NO. 13

February 24, 1948

Mr. J. C. Hendrickson
Austin Dodds Lumber Company
100 Lumbermen's Exchange Bldg.
Eugene, Oregon

Dear Mr. Hendrickson:

I appreciate the fact that you are making every effort to get the matter of the carload of California doors settled. The time is stretching out, and my customer with \$14,000 tied up is being extremely inconvenienced. In consideration of the amount involved I would be very glad if you would push the matter so that we can get it settled without further delay.

Thank you very much for your courtesy in this matter.

Sincerely yours,

/s/ R. M.

RUTH MEYER.

RM/de

cc: Mr. C. K. Barger

PLAINTIFF'S EXHIBIT NO. 16

[Letterhead]

Ruth Meyer — Wholesale Lumber

March 5, 1948

Austin Dodds Lumber Company
100 Lumbermen's Exchange Bldg.
Eugene, Oregon
Attention: Mr. McLaughlin

Dear Mac:

My customer, the Barger Millwork Company, Stateville, North Carolina, is rightfully becoming impatient and concerned at the delay in settling their claim on the car of doors shipped to them in January. I think also that they have been forced to tie up a considerable amount of capital through no fault of their own for too long a time. While we appreciate the fact that you have a very busy office, we also would appreciate your pushing this matter to conclusion at once. Frankly the financial burden which has been placed on my customer at a time when they must consider further buying would be unbearable for an even larger outfit.

May I have your prompt advice.

Very sincerely yours,

/s/ RUTH MEYER,

RM/de

cc: Barger Millwork Co.

F. A. Lytle

DEFENDANT'S EXHIBIT A

[Letterhead]

Interstate Lumber Sales, Inc.

September 23, 1948

Barger Millwork Company
Statesville, North Carolina

Dear Mr. Barger:

This acknowledges your letter of September 13th, 1948 and return of our check #312 for \$615.00.

It will be a real pleasure to meet you when you visit the West Coast and we want you to know that we are looking forward to your arrival. We hope it will be possible for you to spend a little time out here and get acquainted with our great country and its people.

We regret very much the trouble you have had with the car of doors shipped you last January. We do not know how you operate and certainly do not want to cast any reflection upon your method of doing business. Considering the scarcity of doors the first half of this year, we do wonder, whether you have exercised all possible means of disposing of these doors. It seems rather strange that some housing project could not have used these doors long before this.

Considering the length of time since the car was shipped we doubt very much if there is any possible recourse against the mill. Considering also, that we have heard nothing further from you for the past 3 months as to the acceptance of our settlement we

naturally assume that the settlement made was satisfactory. After this long delay, we cannot see now how it is possible for us to do more than we have already done.

For the above reason we are forced to take the attitude that there is little more for us to do and consequently we return our check #312 in the amount of \$615.00.

Cordially yours,
INTERSTATE LUMBER
SALES, INC.,

/s/ J. L. WHITEHOUSE.

JLW:caw

cc: Ruth Meyer

DEFENDANT'S EXHIBIT B

[Letterhead]
Barger Millwork Co.

September 13, 1948

Mr. S. P. McLaughlin
Interstate Lumber Sales, Inc.
100 Lumbermen's Exchange Bldg.
Eugene, Oregon

Dear Mr. McLaughlin:

Sometime ago we received your check for \$615.00, which you offered in settlement of the claim we made on the car of doors you shipped us through Ruth Meyer. After receiving the settlement you

offered, which information we had waited on for several months, we made an effort to move the doors, allowing our customers the approximately 61c off per door that you were allowing us. This did not move the doors at all, so we tried offering them at our net cost, with the additional 61c off but this still did not move them. It seems that the dealers are just not interested in stocking an off-standard door, except possibly at a give-away price.

During the past two months or more since we received your offer, we have tried every method at our disposal to move these doors and we still have 1368 of them in stock; 960—2-8 x 6-8, 380—2-0 x 6-8 and 28—2-6 x 6-8. We feel that we have done everything that you might reasonably expect of us to clear this matter up to the satisfaction of everyone concerned and having failed, we are returning your check for \$615.00 as being an unsatisfactory settlement of our claim and are holding the remaining 1368 doors for your account and for disposal as you see fit. Our attitude in this matter is that we ordered standard F-82 doors and did not receive what we ordered and while we did not feel particularly obligated, we have made a considerable effort to work the problem out for you.

The writer plans to make a trip to the coast within the next three or four weeks, at which time it is hoped we can work this out to a satisfactory conclusion. In the meantime, we hope that you will

find a way to dispose of the doors and we assure you that you will have our continued cooperation.

Sincerely,

/s/ C. K. BARGER.

cc: Ruth Meyer

DEFENDANT'S EXHIBIT C

[Letterhead]

Barger Millwork Co.

March 13, 1948

Mr. S. P. McLaughlin
Austin Dodds Lumber Co.
100 Lumbermen's Exchange Bldg.
Eugene, Oregon

Dear Mr. McLaughlin:

We have your letter of the 9th. with reference to the claim on the car of doors and we are glad to know just what is being done in an effort to settle this claim. We have made considerable effort in our territory to sell some of these doors so that we might be able to determine about what price we could expect them to bring, as against our cost on them after a settlement had been made. So far, we have been unable to move any of them and the complaint is always the same; they do not match the doors in the dealers stock, or in the case of our efforts to move them to Contractors with housing projects, they are not the type door that has been specified or else the quantities we have do not work

out to their requirements and they can't mix them on the job with regular F-82. The design of the doors has been the drawback, with the grade only of slight consideration. Frankly, we are beginning to wonder what we will ever do with the doors, even if we should get them at a considerably reduced price. We paid \$8.40 net for the doors, FOB the Coast and we have just received shipment on a car of doors from Tacoma at an average price of \$6.75 on the Standard make-up F-82, FOB Tacoma; which certainly does not make us feel any better concerning the outcome of this settlement.

We hope that we are not painting too dark a picture. Maybe the hoped-for Spring rush will develop and the customers will come in and take them away from us. (We hope)

We will not continue to worry you about this matter with our letters but we would appreciate it if you would drop us a line occasionally and let us know what progress you are making. We realize that a mill who would ship doors like these will be hard to collect from, but of course we are looking to you, through Ruth Meyer, for our settlement.

We have a customer who builds walk-in refrigerators and he is in the market for a car of approximately 30,000 BFt. #1 Common Fir 2" x 4", kiln-dried to 8% moisture content, S4S to 15/8" x 35/8", 10'-12'-14' and 16' lengths. He wants good material and we want to ship the top end of the grade, at a little higher price if necessary. This customer is particular and I don't want to be left with a car

of lumber on my hands. Would you care to quote us on this car? If so, let us have your quotation as soon as possible, giving us an approximate shipping date.

Sincerely,

/s/ C. K. BARGER.

DEFENDANT'S EXHIBIT F

[Letterhead]

Ruth Meyer — Wholesale Lumber

Austin Dodds Lumber Co.

100 Lumbermen's Exchange Bldg.

Eugene, Oregon

Att: Mr. J. C. Hendrickson

February 7, 1948.

Greetings

Thank you very much for your letter of the 15th. I appreciate your prompt attention to these claims and am confident we shall have satisfactory settlement of both.

I shall look forward to hearing about final disposition.

Sincerely yours,

/s/ RUTH MEYER.

DEFENDANT'S EXHIBIT G

February 5, 1948

Ruth Meyer
Davis Building
Portland 4, Oregon

Greetings:

* * *

In regard to the car of doors. Mr. McLaughlin has today called both the manufacture, and Mr. Barger of the Barger Millwork company, and has heard both sides and has stated that this claim will be brought to a speedy conclusion, probably tomorrow. If and when this is accomplished, we will let you know immediately the outcome.

Very truly yours,

AUSTIN DODDS LUMBER
COMPANY,

J. C. HENDRICKSON.

cc: F. A. Lytle
JCH:nw

DEFENDANT'S EXHIBIT H

[Letterhead]

Ruth Meyer — Wholesale Lumber

Austin Dodds Lumber Co.

100 Lumberman's Bldg.

Eugene, Oregon

Att: Mr. Hendrickson

January 31, 1948

Dear Mr. Hendrickson

In acknowledgment of my purchase order #184 to you covering 1500 Douglas Fir Doors F82 to be shipped to Statesville, N. C. you sent me your order acceptance #2358.

I assume that in acknowledging the order for F82 doors and stating Grade "A", allowing up to 2% "B", you had such assurance from the mill and therefore are protected in the claim now facing us from the customer.

He received a two panel door, but not F82's, the lock rail was centered on the panel and the rail was only 4" wide instead of the approximately 8" of the standard door. Furthermore the doors were about 60 to 70% B with a considerable number of C & D with large knots and obvious defects.

The customer went to considerable expense having shipped them direct to his dealers and he has had to call them in. Rather than send back a complete car, he is willing to talk in terms of settlement which will allow him to move the doors although not what the territory normally uses. I asked him

to suggest what he thought would be a fair refund. He is leaving it to us work this out.

In view of the fact that the amount of money tied up in a carload of doors is so large, I would appreciate prompt action on this particular claim. Will you please advise the first of the week what disposition you can get?

Very sincerely yours,

/s/ RUTH MEYER.

Pay
TO THE
ORDER OF

TO

CUSTOMER'S DRAFT

TO
OF
A



DEFENDANTS EXHIBIT I

No. 312

98-17
1232

INTERSTATE LUMBER SALES
100 LUMBERMEN'S EXCHANGE BUILDING
EUGENE, OREGON

EUGENE, ORE. June 25, 1948 11

PAY
TO THE
ORDER OF

BARGER MILLWORK COMPANY

\$ 615.00

THE SUM *** * 615 DOLS 00 CTS**

DOLLARS

TO **First National Bank**
Eugene, Ore.

INTERSTATE LUMBER SALES, Inc.

BY R.P. McLaughlin

DEFENDANTS EXHIBIT K

CUSTOMER'S DRAFT

06-17 **THE FIRST NATIONAL BANK** 06-17

EUGENE, OREGON, January 15, 1948 11

At Sight

PAY TO THE

ORDER OF FIRST NATIONAL BANK of EUGENE, OREGON

\$ 12,225.00

TWELVE THOUSAND TWO HUNDRED TWENTY FIVE AND NO/100----- DOLLARS

VALUE RECEIVED AND CHARGE TO ACCOUNT OF

WITH EXCHANGE
C AUSTIN DODDS LUMBER CO.

To Ruth Meyer
Bank of California
Portland, Oregon

By: _____

DEFENDANT'S EXHIBIT N

[Letterhead]

Ruth Meyer — Wholesale Lumber

March 25, 1948

Mr. C. K. Barger
Barger Millwork Company
Statesville, North Carolina

Dear Cecil:

Can now ship #1 KD certigrade shingles on association weights at \$10 a square. If your market requires any at the present time, let me know.

I talked with Austin Dodds yesterday, and they didn't give me any information beyond what they wrote you except that they are working on the basis of trying to recover a dollar a door. However, they just came through with settlement of another claim so I'm hoping yours will follow quickly.

With best regards,

/s/ RUTH,
RUTH MEYER.

RM/de

DEFENDANT'S EXHIBIT O

[Letterhead]

Barger Millwork Company

March 30, 1948

Miss Ruth Meyer
Davis Bldg.
Portland 4, Oregon

Dear Ruth:

We have received several letters from you which we have failed to answer for one reason and another, (mostly procrastination), but we feel that the time has now come for us to let you know that we are not really dead but just in a state of dormancy. However, with a week or two of good weather just past and prospects of more to come, there are some signs of activity with the dealers. Most of them have fair stocks but it won't be long until they begin to draw on our stock and that will certainly be a help. We have doors spilling out at every opening. At the present time, we have in this one small warehouse about six cars of doors, two cars of windows, most of the car of Fir lumber you shipped me, about a car and a half of Fir moulding and numerous other odds and ends.

Concerning the shingles mentioned in your last letter, we have had no calls for shingles since last Fall and we are told that the demand is usually heaviest at that time. For that and other reasons, we will probably not want shingles until later in the year but we will keep them in mind.

We have heard nothing from Austin Dodds since their letter three or four weeks ago but there is very little to do but wait for them to work out settlement with the mill. We are still unable to move any of these doors but frankly, I think that they will move when the market becomes active and demand gets a little beyond the ability of the mills to supply. This will probably not happen until about July or August but I can see very little to do but wait. We can't even give them away now and I believe I can hold them and pick up a little on them later.

Please keep everything under control on the coast. I'd hate to wind up out there this Summer and find everything out of hand.

Sincerely,

CERTIFICATE OF CLERK

United States of America,
District of Oregon—ss:

I, Lowell Mundorff, Clerk of the United States District Court for the District of Oregon, do hereby certify that the foregoing documents consisting of complaint, answer of Austin Dodds, answer of Interstate Lumber Sales, Inc., answer of J. L. Whitehouse, pre-trial order, memorandum decision, findings of fact and conclusions of law, judgment, notice of appeal, undertaking on appeal, statement of points, designation of contents of record, stipulation for order, and order to send original exhibits, transcript of docket entries, and this certificate, con-

stitute the record on appeal from a judgment of said court in a cause therein numbered Civil 4320, in which P. M. Barger Lumber Co., a corporation doing business under the name and style of Barger Millwork Company, is plaintiff and appellant, and J. L. Whitehouse, an individual doing business under the assumed name and style of Interstate Lumber Sales, and Interstate Lumber Sales, Inc., is defendant and appellee; that the record has been prepared by me in accordance with the designation of record on appeal filed by the appellant, and in accordance with the rules of this court.

I further certify that there is enclosed herewith duplicate transcript of proceedings dated May 5, 1949, filed in this cause, together with exhibits, Plaintiff's 1 to 18 inclusive, and Defendants A to C, F to T inclusive.

I further certify that the costs on this appeal amounting to \$5.00 have been paid by the appellant.

In Testimony Whereof I have hereunto set my hand and affixed the seal of said court in Portland, in said District, this 29th day of July, 1949.

LOWELL MUNDORFF,

Clerk.

[Seal] By /s/ F. L. BUCK,
Chief Deputy.

[Endorsed]: No. 12315. United States Court of Appeals for the Ninth Circuit. P. M. Barger Lumber Co., a Corporation, Doing Business Under the Name and Style of Barger Millwork Company, Appellant, vs. J. L. Whitehouse, and Interstate Lumber Sales, Inc., Appellees. Transcript of Record. Appeal from the United States District Court for the District of Oregon.

Filed: August 1, 1949.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for
the Ninth Circuit.

In the Circuit Court of Appeals of the United States
for the Ninth Circuit

Civil No. 4320

P. M. BARGER LUMBER CO., a Corporation Doing
Business Under the Name and Style of
BARGER MILLWORK COMPANY,

Plaintiff-Appellant,

vs.

J. L. WHITEHOUSE, an Individual Doing Business Under the Assumed Name and Style of Interstate Lumber Sales, and INTERSTATE LUMBER SALES, INC., an Oregon Corporation,

Defendants-Appellees.

DESIGNATION OF PARTS OF THE TRANSCRIPT OF THE RECORD TO BE PRINTED

Appellant hereby designates the matters referred to herein as the parts of the record necessary for consideration, as follows:

1. Pre-trial order.
2. Exhibit 1, letter dated March 9, 1948, from Austin Dodds Lumber Company to Barger Millwork Company.
3. Exhibit 3, purchase order dated January 12, 1948, from Ruth Meyer, agent to Austin Dodds Lumber Company.

4. Exhibit 4, letter dated June 25, 1948, from Interstate Lumber Sales, Inc., to Barger Millwork Company.

5. Exhibit 5, letter dated May 17, 1948, from Interstate Lumber Sales to Interstate Lumber Sales, Yreka, California.

6. Memorandum of decision.

7. Findings of Fact and Conclusions of Law.

8. Judgment for defendants; also Notice of Appeal and Clerk's Certificate.

9. Testimony, as follows:

Commencing on Page 5 with the question:

Q. Now, Mr. Barger, do you know one Ruth Meyer?—to Page 7, inclusive.

Commencing on Page 9 with the question:

Q. So that in purchase or sale of fir doors in the wholesale millwork . . .", to Page 12, inclusive.

Commencing on Page 21, with the question:

Q. I believe your testimony was that a week or so before you . . .", down to Page 62, inclusive, and ending at Cross-examination.

Commencing on Page 74, first question, down to Page 83, inclusive.

Commencing on Page 92 to and including Page 97.

Commencing on Page 115, line 3 to line 11, inclusive.

Commencing on Page 127, line 2, down to and including Page 130.

Commencing on Page 133 to and including Page 142.

Commencing on Page 155 to and including Page 178.

Commencing on Page 187 to Page 192, excluding redirect examination.

Commencing on Page 194 to Page 196, excluding remarks of Court and Counsel, re-argument of case.

10. This designation of parts of the record.

/s/ LEO LEVENSON,

Of Attorneys for Appellant.

[Affidavit of service by mail attached.]

[Endorsed]: Filed Aug. 4, 1949.

[Title of Court of Appeals and Cause.]

DESIGNATION OF ADDITIONAL PARTS OF THE RECORD TO BE PRINTED

Appellees hereby designate the following additional parts of the record as material to the consideration of the Appeal in the above case:

1. Exhibit 6. Telegram, Meyer to Barger, dated January 12, 1948.

2. Exhibit 13, also marked as Exhibit E. Letter dated February 24, 1948, from Meyer to Hendricksen.

3. Exhibit 16, also marked as Exhibit D. Letter dated March 15, 1948, Meyer to Austin Dodds Lumber Company.

4. Exhibit A. Letter, Interstate to Barger, September 23, 1948.

5. Exhibit B. Letter, Barger to McLaughlin, September 13, 1948.

6. Exhibit C. Letter, Barger to McLaughlin, March 13, 1948.

7. Exhibit F. Letter, Meyer to Hendricksen, February 7, 1948.

8. Exhibit G. Letter, Hendricksen to Meyer, February 5, 1948 (last paragraph).

9. Exhibit H. Letter, Meyer to Dodds, January 31, 1948.

10. Exhibit I. Check No. 312, Interstate to Barger, \$615.00, June 25, 1948.

11. Exhibit J. Telegram, pencil copy, Barger to Meyer, February 4, 1948.

12. Exhibit K. Sight draft, Copy, First National Bank, Eugene, (\$12,225), January 15, 1948.

13. Exhibit N. Letter, Meyer to Barger, March 25, 1948.

14. Exhibit O. Letter, Barger to Meyer, March 30, 1948.

15. Exhibit P. Black notebook, part of records of Mr. and Mrs. Lytle.

16. Exhibit Q. Invoice of Grant Manufacturing Company dated January 12, 1948, to Austin Dodds Lumber Company.

17. Exhibit R. Sight draft to the order of Grant Manufacturing Company dated January 13, 1948.

18. Exhibit S. Ruth Meyer letter to F. A. Lytle, January 10, 1948.

19. Exhibit T. Invoice of Austin Dodds Lumber Company dated January 15, 1948.

20. Testimony, as follows:

All of the transcript of proceedings in the above case not designated by the Appellant excepting testimony beginning with page 98 to and including the next to the last line on page 103.

21. This Designation of Additional Parts of the Record.

DARLING & VONDERHEIT,

By /s/ STANLEY R. DARLING,

Of Attorneys for Appellee.

Affidavit of Service by Mail attached.

[Endorsed]: Filed Aug. 15, 1949.

[Title of Court of Appeals and Cause.]

STATEMENT OF POINTS UPON WHICH
APPELLANT INTENDS TO RELY ON
APPEAL

Appellant hereby adopts the statement of points that was filed in the District Court of the United States for the District of Oregon as the points upon which it intends to rely on appeal in this Circuit Court of Appeals.

Dated this 3rd day of August, 1949.

/s/ LEO LEVENSON,

Of Attorneys for Appellant.

Affidavit of Service by Mail attached.

[Endorsed]: Filed Aug. 4, 1949.